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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM H. HEDLUND, et al.,

Petitioners,

v.

ELSIE VIOLA MILLER, et al.,

Respondents.

Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals

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QUESTION PRESENTED

Does the Sherman Act invalidate state regulations which require each beer and wine distributor to post its prices and offer those prices evenhandedly to all retailers for a specified period, but which neither permit concerted action among distributors nor grant any distributor the "private regulatory power" to set prices for other distributors or retailers, unless the state actively supervises each distributor's pricing decisions?

PARTIES

The parties to the proceeding in the Ninth Circuit Court of Appeals whose judgment is sought to be reviewed are as follows: William H. Hedland, Sylvia S. Bedingfield, Reuben A. Worster, Stan Auderkirk and Jill Thorne, individually in their representative capacities as the Commissioners of the Oregon Liquor Control Commission; C. Dean Smith, individually in his capacity as Administrator for the Oregon Liquor Control Commission (petitioners herein); Elsie Viola Miller and Oretta Bernice Lancaster, doing business as the Junction Cafe and Tavern; Taylors' Coffee Shop, Inc., dba Rennie's Landing; Wian, Inc., dba Barney's Cable, individually and as representatives of others similarly situated (respondents herein), and Beer and Wine Distributors Association, Inc.; Spear Beverage Co., Inc.; Coast Distributors, Inc.; and United Beer Distributing Company; individually and as representatives of others similarly situated.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the Administrator and Commissioners of the Oregon Liquor Control Commission of the State of Oregon, respectfully pray that this Court issue a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals in *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987).

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987), and is attached to this petition as Appendix A. The order and judgment of the district court is reported as *Miller v. Hedlund*, 579 F. Supp. 116 (D. Or. 1984), and is attached as Appendix B.

JURISDICTION

The decision of the Ninth Circuit Court of Appeals was dated and filed initially on October 31, 1986. The decision thereafter was withdrawn and then refiled on April 6, 1987. By order filed August 27, 1987, the Ninth Circuit denied defendants' timely petition for rehearing and suggestion for rehearing en banc. A copy of the order denying the petition for rehearing is attached as Appendix C. This petition for writ of certiorari is filed within 90 days following the filing of the order denying the petition for rehearing, pursuant to Sup. Ct. R. 20, as time is computed under Sup. Ct. R. 28 and 29. The district court had jurisdiction in this matter pursuant to 15 U.S.C. §§ 1, 2, 15 and 26 (1982), and 28 U.S.C. § 1331 (1982). Jurisdiction to review the judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS INVOLVED

The Supremacy Clause, Article VI, of the United States Constitution, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the

> Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

Oregon Revised Statutes (Or. Rev. Stat.) § 471.030 (1985) provides in part:

> (1) The Liquor Control Act shall be liberally construed so as:
>
> (a) To prevent the recurrence of abuses associated with saloons or resorts for the consumption of alcoholic beverages.
>
> (b) To eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of such beverages and to promote temperance in the use and consumption of alcoholic beverages.
>
> (c) To protect the safety, welfare, health, peace and morals of the people of the state.
>
> (2) Consistent with subsection (1) of this section, it is the policy of this state to encourage the development of all Oregon industry.

Or. Rev. Stat. § 471.730 (1985) provides, in part:

> The function, duties and powers of the commission include the following:
>
> (1) To control the manufacture, possession, sale, purchase, transportation, importation and delivery of alcoholic liquor in accordance with the provisions of this chapter.
>
> . . . .
>
> (5) To adopt such regulations as are necessary and feasible for carrying out the provisions of this chapter

and to amend or repeal such regulations. When such regulations are adopted they shall have the full force and effect of law.

Oregon Administrative Rules (Or. Admin. R.) 845-06-090 (1987) provides:

> A licensed retailer of malt beverages or of wine who is operating under a restaurant license, package store license, retail malt beverage license or dispenser license may transport, or have transported by the licensed retailer's employe or by a common carrier, from the licensed wholesaler premises to the licensed retailer premises, the malt beverages or wine sold to the licensed retailer by the licensed wholesaler. The purchase price of such malt beverages or wine shall be the price posted pursuant to OAR 845-10-210.

Or. Admin. R. 845-10-210 (1984) provided:

> *Price Posting.*
>
> (1) Posting of malt beverage prices:
>
> (a) Licensees of the Commission engaged in the business of soliciting the sale of, selling or distributing malt beverages for resale within the State of Oregon shall file with the Commission at its Portland office a written schedule in three copies of prices to be charged for all such beverages offered for sale within the state. The prices shall be uniform for the same class trade buyers and shall set forth:
>
> (A) All brands and types of products offered for sale,
>
> (B) The delivered sale price for each size container to retail licensees,
>
> (C) Prices or maximum allowances or discounts to wholesale licensees, and
>
> (D) Any allowance granted for return containers.
>
> All price postings shall be consistent as between the various packages and containers offered for sale. No price postings involving quantity discounts shall be made.

(b) The Commission may reject any price posting which is in violation of any of its rules. . . .

(c) Unless rejected by the Commission, prices shall be effective on the tenth day following receipt of the posting at the Portland office of the Commission. . . .

(d) All postings reflecting a price decrease, when accepted, shall remain in effect for 180 days after the effective date of the posting. The Commission, at its discretion, may waive the 180-day period to allow for price increases based upon conditions which in its opinion warrant the increases.

(2) Posting of wine prices:

(a) Licensees of the Commission engaged in the business of soliciting sales of, selling or distributing wine for resale within the State of Oregon shall file with the Commission at its Portland office a written schedule in two copies of prices to be charged by such licensee for all wine offered for sale within the state. The prices shall be uniform for the same class of trade buyers and shall set forth:

(A) All brands, classes and kinds of wine offered for sale, and

(B) The delivered sale price of each size container to retail licensees.

Prices shall be the same for one container as for each like container in any quantity comprising a sale, order or delivery. No allowance shall be made for return of containers and a wholesale licensee shall not purchase used containers from a retail licensee.

(b) The Commission may reject any price posting which is in violation of any of its rules. . . .

(c) Unless rejected by the Commission, prices shall be effective on the tenth day following receipt of the posting at the Portland office of the Commission. . . .

(d) All postings reflecting a price decrease, when accepted, shall remain in effect for 30 days after the

effective date of the posting. The Commission, at its discretion, may waive the 30-day period to allow for price increases based upon conditions which in its opinion warrant the increases.

STATEMENT OF THE CASE

The Oregon Liquor Control Act, enacted in 1933, established a regulatory system for the distribution of alcoholic beverages among manufacturers, wholesalers and retailers in Oregon. The Act also created the Oregon Liquor Control Commission (hereinafter, "OLCC" or "commission") and granted the commission extensive powers to adopt regulations to implement the statutory policies.[1]

Pursuant to statutory authority, the commission adopted regulations governing the sale of beer and wine by distributors to retailers.[2] These regulations, *inter alia*,

1) require distributors to post their prices with the commission ten days before their effective date;

2) require that price decreases which they post remain in effect for 180 days for malt beverages[3] and 30 days for wine

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[1] As presently constituted, the OLCC consists of five commissioners appointed by the Governor, subject to confirmation by the Senate. Or. Rev. Stat. § 471.705 (1985). One commissioner is designated to be chosen from the food and alcoholic beverage industry. *Id.* The other four commissioners, as well as all persons holding office or position under the commission, are prohibited from having "any connection with any person engaged in or conducting any alcoholic liquor business of any kind" and from having any pecuniary interest in or receiving any profit from purchases by the commission or persons authorized to manufacture, purchase or sell any alcoholic liquors. Or. Rev. Stat. § 471.710 (1985). The commissioner appointed from the industry is not eligible to serve as the chairman of the commission. Or. Rev. Stat. § 471.715(1) (1985). When this litigation commenced in 1978, the statutes provided for three commissioners, none of whom was permitted to have ties to the alcoholic beverage industry. Or. Rev. Stat. § 471.710 (1979 Replacement Part).

[2] In Oregon, packaged hard liquor is sold exclusively through state-owned liquor stores, whereas beer and wine are sold by private retailers.

[3] The current rules require malt beverage prices to remain in effect for only 90 days and provide that the commission may waive the 90-day period under specified conditions. Or. Admin. R. 845-10-210(1)(d) (1987).

(the "post-off" rules);

3) require that the posted price be the purchase price to the retailer, regardless of the distributor's actual delivery costs (the "delivered price" rules); and

4) prohibit distributors from giving retailers discounts from the posted price based on the quantity of beer or wine sold to retailers.

Under these regulations, every distributor unilaterally sets its own prices, posts those prices and offers them uniformly to its customers for the period specified in the rules, without quantity or delivery-related discounts. No distributor has the power to set prices for any other distributor or for any retailer.

The uniform price regulations are designed to prevent "tied house" arrangements prevalent in earlier times, in which distributors controlled retail establishments through discriminatory pricing practices and left most retailers at the mercy of distributors who discounted prices to a few favored retailer-customers. The post-off rule prevents a distributor from posting a low price one day for a favored customer and then immediately restoring the higher price for other customers. Public price posting allows distributors and retailers to monitor and report to the commission any instances of non-compliance with the regulatory scheme.

In 1978, several retailers of beer and wine, respondents in this Court, filed suit in the United States District Court for the District of Oregon against the commission and several wholesaler-distributors. The retailers challenged the four regulatory provisions described above on the ground that the regulations had the effect of stabilizing beer and wine prices in violation of the Sherman Act, 15 U.S.C. §§ 1, *et seq.*[4] The

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[4] The retailers subsequently dropped their challenge to the prohibition of quantity discounts, and the Ninth Circuit did not rule on it.

retailers sought declaratory and injunctive relief to prevent the commission from enforcing the challenged regulations.

In 1979, the district court stayed the proceedings to allow the Oregon courts to review the validity of the challenged regulations under the commission's enabling legislation. The Oregon Court of Appeals held the regulations to be valid and reasonably designed to advance statutory policy. *Miller v. OLCC*, 42 Or. App. 555, 600 P.2d 954 (1979), *review denied* 288 Or. 493 (1980).

Thereafter, the district court dismissed the retailers' federal suit on the ground that Oregon's involvement in the regulation and control of the liquor industry was sufficient to establish its immunity from federal antitrust law under the doctrine of state action immunity, first articulated by this Court in *Parker v. Brown*, 317 U.S. 341 (1943). Because the immunity was dispositive, the district court did not consider whether the regulations violated the Sherman Act or whether the Twenty-first Amendment constituted a defense. On appeal, the Ninth Circuit reversed the dismissal and remanded for further proceedings. *Miller v. Oregon Liquor Control Com'n*, 688 F.2d 1222 (9th Cir. 1982). The Ninth Circuit held that Oregon did not "actively supervise" its regulatory policy and therefore was not entitled to immunity under *Parker v. Brown*. It expressed no opinion on the two issues which the district court had not reached.

On remand, the parties filed cross motions for summary judgment. The commissioners contended that the regulations did not violate the Sherman Act because they neither authorized nor required any concerted activity, and that neither the

commissioners nor the wholesaler defendants had engaged in any combination, conspiracy or agreement in restraint of trade. They also renewed arguments based on state action immunity and the Twenty-first Amendment.

The district court granted defendants' motion. The court found no concerted action as to the regulations requiring wholesalers to post their prices and adhere to them for certain time periods. Because compliance with the regulations entails only unilateral action by the distributors, the court concluded that the regulations did not violate the Sherman Act. The court found a conflict with the Sherman Act as to the delivered price regulations. Nonetheless, it relied on intervening changes in Oregon law to conclude that the regulations were protected by state action immunity. The court found no concerted activity on the part of the distributors and, accordingly, granted judgment in their favor as well.

The retailers appealed to the Ninth Circuit, which reversed and remanded. *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987). The Ninth Circuit concluded that the challenged regulations effected a *per se* violation of the Sherman Act, despite the absence of concerted activity among the distributors in their unilateral compliance with the commission's regulations. The absence of concerted activity, however, led the court to affirm the district court's judgment in favor of the distributors.

After concluding that the commission's regulations violated the Sherman Act, the court then decided that Oregon's involvement in the regulatory scheme was not sufficient for the state to invoke state action immunity. Because the court viewed Oregon's regulations as a "hybrid" restraint, it applied the two-pronged test of *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), conditioning immunity on a clearly articulated and affirmatively expressed state policy and the state's active supervision of the policy. Without

reaching the first prong of the *Midcal* test, the court concluded that the state clearly failed the second prong because the state does not actively supervise distributors' individually set prices. The Court remanded the case to the district court for consideration of the Twenty-first Amendment issue.

The Ninth Circuit withdrew its opinion pending this Court's decision in *324 Liquor Corp. v. Duffy*, 107 S.Ct. 720 (1987). After that case was decided, the Ninth Circuit concluded that *324 Liquor Corp.* confirmed its reasoning in *Miller* and it, therefore, reissued its opinion. 813 F.2d 1344. The OLCC commissioners now petition this Court for a writ of certiorari.

REASONS TO GRANT THE WRIT

The Ninth Circuit erroneously concluded in this case that a state scheme regulating the manner in which beer and wine distributors set prices they charge to retailers is invalid under the Sherman Act, even though the regulations authorize no concerted activity and grant no private regulatory power. The Ninth Circuit's decision conflicts with decisions of other circuit and state courts which have upheld similar price regulation schemes against attack under the Sherman Act. Because many states have regulations similar to those at issue in this case, the Ninth Circuit's decision leaves those states in doubt as to whether their regulatory schemes withstand Sherman Act scrutiny.

In reaching its conclusion, the Ninth Circuit erroneously identified the regulations at issue in this case as "hybrid" restraints on competition. The court went astray partly because it lacked the guidance which would enable it to distinguish between hybrid and purely public restraints. While antitrust decisions from this Court are legion, the cases discussing the concept of hybrid restraints—how they are identified and what analysis applies to them—can be counted on one hand. The ability to distinguish between hybrid and purely public restraints, how-

ever, is critical. To establish the requisite "state action" necessary to give a hybrid regulatory scheme Sherman Act immunity, states must actively supervise the private, regulatory conduct that the scheme authorizes. On the other hand, states need not actively supervise private conduct authorized in a purely public scheme, because the only restraints on competition are those directly mandated by state law. The Oregon scheme is purely public because it confers no private regulatory power; hence, there is no conduct which the state must supervise.

Hybrid regulation, with its attendant active state supervision components, is expensive and time consuming to administer. States such as Oregon, which desire to regulate only limited aspects of the marketplace, need to know the difference between hybrid regulation and purely public regulation so that they can tailor their regulations, where possible, to avoid resource-draining "hybrid" regulatory schemes. Only this Court can provide the necessary guidance. Because this Court's resolution of the issue presented in this case will resolve a split in the circuits and have wide-ranging impact in an important and emerging area of antitrust law, the Court should grant this petition for writ of certiorari.

I. The Ninth Circuit erroneously construed the commission's limited, purely public regulation as a "hybrid" restraint on competition which *per se* violated section 1 of the Sherman Act.

The Ninth Circuit erred in concluding that Oregon's regulatory scheme is a "hybrid" restraint on competition forbidden by the Sherman Act. Oregon's regulations neither require nor authorize private parties to engage in concerted activity to restrain competition, and do not confer on private parties any regulatory authority. Each distributor acts independently in posting its own beer and wine prices, and no other distributor is required to read or follow any other distributor's

prices. The regulations mandate that distributors adhere to their posted prices for a set period, and that the posted prices be the delivered prices regardless of actual delivery costs. The posted prices do not control the prices retailers may charge, but do prevent distributors from giving preferential treatment (*e.g.*, lower prices) to some retailers and not others.[5]

The Ninth Circuit rejected the state's argument that the absence of concerted activity among distributors precludes a finding that the regulations mandating this conduct violate the Sherman Act. The court also rejected the state's argument that the regulations conferred no private regulatory power but were a unilateral restraint imposed by government, immune from invalidation under the Sherman Act.

The court first noted that "[a]n agreement to adhere to previously announced prices and terms of sale is unlawful *per se* under the Sherman Act." 813 F.2d at 1349. The court then observed that because Oregon's regulatory scheme

> facilitate[s] the exchange of price information and require[s] adherence to the publicly posted prices. . . . the state compels activity that would otherwise be a *per se* violation of the Sherman Act. It is the presence of state compulsion that requires a more refined analysis than the one presented by the appellees. Simply ending the analysis because of the lack of concerted activity among the wholesalers fails to take into account the presence and effect of the state's involvement in the matter.

Id.

After discussing this Court's decisions in *Fisher v. City of Berkeley, Cal.*, 106 S.Ct. 1045 (1986), *Schwegmann Bros. v.*

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[5] In upholding the commission's regulations against a challenge that the regulations exceed the commission's statutory authority, the Oregon Court of Appeals noted that the regulations advanced both statutory and constitutional objectives. Principal among those objectives were prohibiting financial assistance to retailers, separating possible wholesale and retail financial connections and ensuring that beer and wine prices would be the same for all retailers. *Miller v. OLCC*, 42 Or App at 561-62, 600 P2d at 957-58.

Calvert Distillers Corp., 341 U.S. 384 (1951), and *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), the court compared this case to *Schwegmann* and *Midcal* and concluded that Oregon's regulations were a "hybrid" restraint that violated the Sherman Act:

> First, *Schwegmann* demonstrates that a showing of concerted activity among the Oregon wholesalers is not necessary to establish an antitrust violation. The mere fact that each wholesaler complies unilaterally with the regulations does not save an impermissible pricing scheme from an antitrust challenge. In *Schwegmann*, non-contracting retailers were compelled to comply unilaterally with a state-authorized pricing scheme, but the absence of concerted activity among the retailers was not a bar to a finding of a Sherman Act violation. Second, *Schwegmann* and *Midcal* show that Oregon's actions are not unilateral. The regulations constitute a "hybrid" restraint because, as in those two cases, Oregon allows private parties to set the prices and does not review the reasonableness of those prices. It follows that this case is unlike the purely public restraint of Berkeley's regulatory scheme which removed the power to set rents from the landlords.

813 F.2d at 1350-51.

The Ninth Circuit erroneously relied on *Schwegmann* and *Midcal* to decide the instant case. As is discussed below, *Schwegmann* and *Midcal* did not require concerted activity because the conduct which the schemes in those cases authorized—resale price maintenance— constitutes a *per se* Sherman Act violation. *Midcal*, 445 U.S. at 102. In contrast, under Oregon's scheme, the required private conduct does not *per se* violate the Act, and, indeed, the Ninth Circuit dismissed the Sherman Act claim against the private distributors. The Ninth Circuit, thus, was wrong in concluding that Oregon's regulations did not have to authorize concerted activity to run afoul of the Sherman Act.

As is also discussed below, *Schwegmann* and *Midcal* were hybrid restraint cases because they conferred regulatory power on private individuals to restrain competition in a manner that violated the Sherman Act. Under Oregon's scheme, private distributors are granted no private, regulatory power because their conduct regulates no one else's behavior. The Ninth Circuit erred in further concluding that Oregon's regulatory scheme is a hybrid restraint on competition which is immune from the Sherman Act only if the state actively supervises private distributors' prices.

A. The Ninth Circuit erred in concluding that Oregon's regulations need not authorize concerted activity among distributors for the regulations to violate the Sherman Act.

The Ninth Circuit decided that because "concerted activity" was not present in either *Schwegmann* or *Midcal*, concerted activity by distributors in setting and adhering to their prices was not required in order for the Sherman Act to preempt Oregon's regulatory scheme. *Schwegmann* and *Midcal* are not controlling, however, because the rationale for dispensing with actual, concerted activity in those cases does not exist in the present case.

When this Court decided *Schwegmann*, the Miller-Tydings Amendment to the Sherman Act, 50 Stat. 693, authorized retail price fixing between consenting distributors and retailers, conduct which, but for the amendment, would constitute a *per se* violation of the Sherman Act. 341 U.S. at 386. The Miller-Tydings Amendment thus permitted distributors to restrain the market to the extent their market strength or position would enable them to co-opt retailers into agreeing to adhere to the distributors' retail prices. Louisiana, however, attempted to bind non-consenting retailers to retail price schedules set forth in distributors' agreements with other retailers. Louisiana law further permitted distributors

to enforce their price schedules against non-consenting retailers. This Court concluded that Louisiana, by permitting distributors to restrain the market in a way that their own market strength or position might not permit, had exceeded the scope of the exemption which the Miller Tydings Amendment had intended.

> And when we read what the sponsors wrote and said about the amendment, we cannot find that the distributors were to have the right to use not only a *contract* to fix retail prices but a *club* as well.

Id. at 395 (emphasis in original). Thus, without the shield of the Miller-Tydings Amendment, Louisiana's law authorized conduct which constituted a *per se* Sherman Act violation.[6]

In *Midcal*, California's statutory scheme similarly involved mandatory resale price maintenance. The scheme required wine producers to file either fair trade contracts or price schedules with the state, and required wine wholesalers to sell wine at the prices fixed in the contracts or price schedules. This Court noted that this regulatory scheme authorized resale price maintenance, a result which was *per se* in violation of the Sherman Act since repeal of the Miller-Tydings Act in 1975. 445 U.S. at 102. Because the scheme gave wine producers the power to dictate the prices that wholesalers could charge,

> such vertical control destroys horizontal competition [among wholesalers] as effectively as if wholesalers "formed a combination and endeavored to establish the same restrictions . . . by agreement with each other."

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[6] The Ninth Circuit probably is wrong that *Schwegmann* did not involve concerted activity. Indeed, under Louisiana law, before retailers who had not signed a resale price agreement could be bound to sell at the distributor's set retail price, that price had to be established in an agreement between the distributor and at least one retailer. 341 U.S. at 387.

Id. at 103 (quoting from Justice Hughes' opinion in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, 408 (1911)).

Concededly, the decisions in both *Schwegmann* and *Midcal* could have been clearer as to why the state regulatory schemes involved in those cases satisfied the "contract, combination . . . or conspiracy" requirement of section 1 of the Sherman Act. The scheme in *Midcal* did not authorize wine producers to agree either among themselves or with their wholesalers that wholesalers would adhere to the producers' specified resale prices. But because the statutory schemes authorized wine producers in *Midcal* and distributors in *Schwegmann* to restrain competition in a way that they could otherwise achieve only by "contract, combination . . . or conspiracy," the court apparently decided the concerted activity requirement of section 1 of the Sherman Act had been met. These cases, then, appear to hold that even without actual concerted activity, the Sherman Act preempts a regulatory scheme that authorizes conduct such as resale price maintenance, because the conduct has such a "pernicious effect on competition and lack[s] . . . any redeeming virtue" (*see Northern Pac. R. Co. v. United States*, 356 U.S. 1, 4-5 (1958)), that it *per se* violates the Act.[7]

In terms of its anti-competitive effect, the conduct mandated by the commission's regulations in the present case is not in the same class as the conduct in *Midcal* and *Schwegmann*. First, the distributors' conduct, absent state compul-

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[7] This Court's recent decision in *324 Liquor Corp. v. Duffy*, 107 S.Ct. 720 (1987) is to the same effect. The Ninth Circuit said *324 Liquor Corp.* "confirms the reasoning and conclusions set forth in the opinion." 813 F.2d at 1345. Like the statutes in *Midcal* and *Schwegmann*, New York's liquor law authorized distributors to set minimum prices at which liquor would be sold at retail. This authority was conferred as a result of a scheme which required retailers to sell liquor at no less than 112 percent of the distributor's posted bottle price. This Court concluded that the analysis in *Midcal* provided the "framework" for resolving the issue in the case. 107 S.Ct. at 724.

sion, would not alone violate the Sherman Act. A distributor could lawfully decide to announce its prices and adhere to those prices for a given period. Setting prices violates the Sherman Act only if a private individual sets someone else's prices; setting one's own prices does not violate the Act. Yet, that is all that occurs under Oregon's regulatory scheme.

Second, the commission's regulations do not authorize, let alone mandate, *resale* price maintenance or any other conduct that *per se* would violate the Sherman Act. The prices posted by distributors do not prevent beer and wine retailers from charging any price they may deem appropriate, whether above or below the posted wholesale prices. Thus, the posting requirement permits intra-brand competition among retailers and, unlike the *Midcal* and *Schwegmann* schemes, it also permits inter-brand competition. Moreover, distributors of different brands freely may adjust their prices upward or downward after the lapse of 30 days (wine) or 90 days (beer) in response to prices posted by distributors of competing brands.[8] At most, Oregon's statutory scheme may have the effect of producing less vigorous inter-brand competition than might exist in the absence of the 30- and 90-day posting periods. But the fact that a state regulation might have some anti-competitive effect is not a basis for its invalidation under the Sherman Act. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

In determining that Oregon's regulations satisfied the "contract, combination . . . or conspiracy" requirement because they require distributors to post prices and adhere to

[8] Restraint in inter-brand competition is further attenuated because only price *decreases* are subject to the 30-day and 90-day posting requirements. A distributor who posts a price increase is free at any time to respond to the competition by further increasing or decreasing its price. Moreover, a distributor who posts a price decrease will not be required to adhere to that price for the 30-day or 90-day period if it can convince the commission that circumstances warrant lifting the requirement. *See* Or. Admin. R. 845-10-210(1)(d) and (2)(d) (1987).

them, the Ninth Circuit ignored this Court's teachings in *Fisher v. City of Berkeley, Cal.*, and misconstrued the effect of Oregon's regulations under the Sherman Act. In *Fisher*, this Court held that a city ordinance freezing rents and granting a governmental body the authority to allow rental adjustments as conditions may warrant constituted "purely public" or "unilateral" government regulation exempt from the Sherman Act. 106 S.Ct. at 1051. This Court stressed that a landlord's (or distributor's) decision to adhere to its announced price for a set period does not amount to a contract, combination or conspiracy to restrain competition just because the state mandates the decision.

> A restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy. Similarly, the mere fact that all competing property owners must comply with the same provisions of the Ordinance is not enough to establish a conspiracy among landlords.

Id. at 1049-50. Just as the absence of actual, concerted activity by landlords to fix rental ceilings required the court to find that the City of Berkeley's regulations freezing rent levels did not violate the Sherman Act, so too, the absence of actual, concerted activity by beer and wine distributors should preclude a conclusion that OLCC's price posting regulations violate the Act.

The Ninth Circuit concluded that *Fisher* does not control the present case because in *Fisher* the regulatory scheme removed the landlord's power to set rents. But this is a distinction of degree only that should not matter in the ultimate analysis. To a degree, the commission's regulations also divest the distributors of their ability to set prices by mandat-

ing that once prices are set they must be adhered to for a given time. However, the regulations also provide that the commission may permit posted prices to be adjusted upward if conditions warrant the increase. *See* note 8, *supra*. That beer and wine distributors, at the end of the posted period, are free to adjust their prices up or down does not prevent the regulations from being "purely public" or "unilateral" under the *Fisher* analysis. If the City of Berkeley had imposed less ambitious rent stabilization measures that simply required landlords to adhere to rental prices for a period of six months or one year, after which they could adjust their rental prices up or down as they deemed appropriate, it is inconceivable that this Court would hold the city's failure to set the rental prices at the end of the period subjected the regulations to Sherman Act scrutiny.

The Ninth Circuit was wrong in concluding that concerted activity by distributors was not necessary to find that the Sherman Act preempted Oregon's regulations.

B. To the extent Oregon's regulations may authorize conduct that *per se* violates the Sherman Act, the regulations are pure "state action" and confer no private regulatory authority.

Even assuming Oregon's regulations fulfilled the concerted activity requirement, as they did in the resale price fixing cases discussed above, that fact is not fatal. Where, as here, the state regulations mandate price posting and adherence to those prices, and set the period for which prices must remain in effect, the regulations are not invalid. It is just this kind of state action that the Court held in *Parker v. Brown* to be immune from challenge under the Act. As the Court in *Parker* stated, "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." 317 U.S. at 351. *See also Town of Hallie v. Eau Claire*, 471 U.S. 34

(1985); *Fisher v. City of Berkeley, Cal.*, 106 S.Ct. at 1051-52 (Powell, J., concurring). Precisely because the state regulations require price posting, specify how long distributors must adhere to their prices and grant private parties no discretion or "regulatory power" in this regard, the regulations constitute pure "state" action, immune from the Sherman Act, and not "hybrid" state action for which immunity can only be determined after applying the two-pronged *Midcal* analysis.

Hybrid restraints exist when state regulations confer on private entities a degree of private regulatory power. *Fisher v. City of Berkeley, Cal.*, 106 S.Ct. at 1050. *Midcal* requires the state actively to supervise the private regulatory power to ensure that the private decisions made pursuant to that power advance state policy, not the private actor's own interests. *Town of Hallie*, 471 U.S. at 47. In *Schwegmann*, *Midcal* and *324 Liquor Corp.*, because the state allowed private parties to set the resale prices, the state was required actively to supervise those prices to ensure that they were consistent with the state's articulated resale price maintenance policy.

In Oregon's regulatory scheme, unlike those considered in *Schwegmann*, *Midcal* and *324 Liquor Corp.*, the predicate for active state supervision—conferrence of private, regulatory power—is absent. The scheme does not authorize distributors to agree among themselves to post their prices and adhere to those prices for a period they agree upon. Posting prices and the period for adherence to those prices are mandated by the regulatory scheme itself. The regulations *confer* no private power, because even without state involvement, distributors may establish their own prices. Moreover, because setting once's own prices regulates no one else's conduct, no "regulatory" power is conferred.

Because Oregon's scheme confers no private, regulatory power, Oregon's regulatory scheme is not "hybrid." No requirement or reason exists for the state to supervise dis-

tributors' prices. *Fisher*, not *Midcal*, should control. This Court should reverse the Ninth Circuit's decision that Oregon's regulatory scheme is a "hybrid" restraint which survives the Sherman Act only if the state actively supervises distributors' own prices.

II. Both the concept of a "hybrid restraint" and the analysis which follows from characterizing state regulation as a hybrid restraint need clarification from this Court.

In a series of cases decided over the past twelve years, this Court has developed a framework for determining the types of state regulation and regulated activities which are not preempted by or are immune under the Sherman Act. The focus of the inquiry has been to ascertain the degree to which the challenged conduct represents the policy of the state acting in its sovereign capacity, as opposed to private conduct motivated by private interests. To refine that inquiry, the Court recently has developed a modified analysis for "hybrid restraints" on competition, which require closer scrutiny than purely public ones. *See 324 Liquor Corp. v. Duffy*; *Fisher v. City of Berkeley, Cal.*; and *Rice v. Norman Williams Co.* (Stevens, J., concurring in the judgment). Yet the precise nature of hybrid restraints—as well as the analysis that follows from that characterization—remains unclear.

To date, the Court has analyzed as a hybrid restraint only state regulation which confers regulatory power on private parties. *See, e.g., California Liquor Dealers v. Midcal Aluminum*; *324 Liquor Corp v. Duffy*; *Southern Motor Carriers v. U.S.*, 471 U.S. 48 (1985). The court of appeals treats Oregon's regulatory scheme as a hybrid restraint, even though the scheme confers no private regulatory power and even though the court agreed that the private defendants had not themselves violated the Sherman Act. The Ninth Circuit fails to distinguish between state action which merely requires pri-

vate parties to comply with the state's market regulations and that which grants them power to regulate other private parties. As a result, the court upsets the delicate balance between federal supremacy and state sovereignty which lies at the heart of our federal system. The Ninth Circuit's approach illustrates the need for this Court to clarify the "hybrid restraint" aspect of the preemption and state action immunity doctrines.

The Ninth Circuit's decision also is flatly inconsistent with decisions of other federal courts of appeals, federal district courts and state supreme courts rejecting antitrust challenges to state regulations requiring posting of wholesale prices and adherence to those prices for a specified time.[9] The Second Circuit sustained such regulations in New York and Connecticut respectively in *Battipaglia v. N.Y. State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984) and *Morgan v. Division of Liquor Control, Etc.*, 664 F.2d 353 (2d Cir. 1981), *affirming Serlin Wine & Spirits Merchants, Inc. v. Healy*, 512 F.Supp 936 (D. Conn. 1981). Substantially similar price posting and price adherence regulations survived antitrust challenges in *Enrico's, Inc. v. Rice*, 551 F.Supp. 511 (N.D. Cal. 1982), *Intercontinental Packaging Co. v. Novak*, 348 N.W.2d 330 (Minn. 1984), and *Wine and Spirits Specialty, Inc. v. Daniel*, 666 S.W.2d 416 (Mo. 1984). Each of these decisions reviews this Court's *Midcal* opinion in detail and distinguishes the price-posting and price adherence regulations from the regulatory scheme invalidated in *Midcal*. Nothing in the courts' analyses suggests that this Court's most recent decision in *324 Liquor Corp.* would alter their decisions.[10]

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[9] *Miller* is consistent, however, with the decision in *Lewis-Westco v. Alcoholic Bev. Cont.App. Bd.*, 136 Cal.App.3d 829, 186 Cal.Rptr. 552 (1982), *cert. denied*, 464 U.S. 863 (1983).

[10] *See 324 Liquor Corp., supra*, 107 S.Ct. at 725, n.6, distinguishing *Morgan v. Division of Liquor Control, supra.*

As a matter of policy, a state's interest in regulating an industry or profession may justify regulation which ranges from minimum oversight designed to punish or prevent specific types of abuses to close scrutiny of every aspect of the regulated industry or profession. The Ninth Circuit's decision unnecessarily constrains the state's latitude to fashion its policy. The decision requires a state which imposes limited constraints on price competition to assume the burden of overseeing competitive pricing decisions made within the state's regulatory framework, even where the regulation confers no private, regulatory power and authorizes no private, anti-competitive conduct.

Oregon has neither reason nor resources to review the reasonableness of distributors' prices, as the Ninth Circuit would require. Oregon has set a few, relatively unrestrictive boundaries on price competition; within those boundaries, it does nothing to alter the balance of competitive forces. If a state which seeks to impose minimal restraints must necessarily occupy the entire field, "nothing short of a complete monopolization of the industry by the State could escape Sherman Act liability." *Serlin Wine & Spirit Merchants, Inc. v. Healy*, 512 F.Supp. at 939. Nothing in this Court's decisions supports the proposition that a state which regulates some aspects of the marketplace violates the Sherman Act unless it assumes full control of the marketplace.

Several states' price posting regulations are in jeopardy under the Ninth Circuit's analysis. Nearly every state imposes extensive regulation on the sale of alcoholic beverages. While the specifics of the regulatory schemes vary considerably from one state to another, the price posting features of Oregon's regulation are a common ingredient of many state regulations.[11] Given the Ninth Circuit's decision in the

[11] Twenty-three states require price posting for distilled spirits, beer and

(Footnote continued on next page)

present case, these states are left in a quandary as to whether their price posting regulations are a permissible means of regulating the liquor industry. This Court's guidance in distinguishing between purely public and hybrid regulatory schemes is critical, not only for the benefit of states which actively regulate the liquor industry, but also for all state and governmental units which engage in limited regulation of other areas of the private marketplace.

CONCLUSION

For the reasons given above, the Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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(Footnote continued from previous page)

wine, or at least one of the three. *See, e.g.*, Ariz. Rev. Stat. Ann. § 4-252; Calif. Bus. & Prof. Code § 25000; Conn. Gen. Stat. § 30-63; Del. Code Ann. tit. 4, § 508; Georgia Comp. R. & Regs. r. 560-2-3-.45; Haw. Rev. Stat. § 281-123; Kan. Stat. Ann. § 41-1101; Me. Rev. Stat. tit. 28, § 655, tit. 28A, § 1408; Mass. Gen. L. ch. 138, § 25C; Mich. Admin. Code r. 436.1625, 436.1726; Mo. Rev. Stat. §§ 311.332, .334, .336, .338; N.J. Admin. Code tit. 13, § 2-24.5; N.M. Stat. Ann. § 60-8A-12; S.D. Admin. R. 64:75:03:02; Tenn. Code Ann. § 57-6-104(a); Wash. Admin. Code §§ 314-20-100, 314-20-105, 314-24-190, 314-24-200.

APPENDIX A

Elsie Viola MILLER and
Oretta Bernice Lancaster,
doing business as the Junction Cafe and Tavern;
Taylor's Coffee Shop, Inc.,
dba Rennie's Landing;
Wian, Inc., dba Barney's Cable,
individually and as representatives
of others similarly situated,
Plaintiffs-Appellants,

v.

William H. HEDLUND;
Sylvia S. Bedingfield;
Reuben A. Worster;
Stan Auderkirk and Jill Thorne,
individually in their representative
capacities as the Commissioners of the
Oregon Liquor Control Commission;
C. Dean Smith,
individually in his capacity as Administrator for the
Oregon Liquor Control Commission,
Spear Beverage Co., Inc.,
and Coast Distributors, Inc.;
individually and as representatives of
others similarly situated,
Defendants-Appellees.

No. 84-3749.

United States Court of Appeals,
Ninth Circuit.

Argued July 10, 1985.

Decided Oct. 31, 1986.

Withdrawn Dec. 19, 1986.

Resubmitted Jan. 21, 1987.

Refiled April 6, 1987.

[Names of counsel omitted in printing]

Before BROWNING, Chief Judge, ALARCON, Circuit Judge, and STEPHENS,* District Judge.

ORDER

The opinion in this case was originally filed on October 31, 1986. On December 19, 1986, the opinion was withdrawn and the submission of this case was vacated pending resolution by the United States Supreme Court of *324 Liquor Corp. v. Duffy*, No. 84-2022. *324 Liquor Corp.* was decided on January 13, 1987 and is reported in ___ U.S. ___, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987). This case was resubmitted on January 21, 1987.

324 Liquor Corp. confirms the reasoning and conclusions set forth in the opinion that was withdrawn. It is hereby ordered that the opinion filed on October 31, 1986 and withdrawn on December 19, 1986 be refiled with this order.

STEPHENS, District Judge:

BACKGROUND

This is an appeal from a summary judgment rejecting plaintiffs' antitrust challenge to certain Oregon regulations governing the sale and distribution of beer and wine. The district court's judgment is reversed and remanded for further proceedings in accordance with this opinion.

The Oregon Liquor Control Act was enacted in 1933. It established a distribution structure for alcoholic beverages among manufacturers, wholesalers and retailers in Oregon. *See* O.R.S. sections 471.205, *et seq.* It also estab-

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* Honorable Albert Lee Stephens, Jr., Chief Judge Emeritus, Central District of California, sitting by designation.

lished a six-member Oregon Liquor Control Commission (OLCC) to administer its provisions. *See* O.R.S. section 471.705. The Oregon Liquor Control Act gave the OLCC extensive power to promulgate rules and regulations to carry out the purposes of the Act. O.R.S. sections 471.040, 471.730, 471.045; *Van Ripper v. Oregon Liquor Control Commission*, 228 Or. 581, 591, 365 P.2d 109 (1961). Oregon Revised Statutes sections 471.210, *et seq.* set forth requirements for the licensing of wholesalers of beer and wine. Other provisions in the Oregon Revised Statutes prohibit a licensee's selling at both the wholesale and retail levels (O.R.S. section 471.452); restrict a wholesaler or manufacturer from having an interest in a retailer (O.R.S. section 471.455); and prevent a manufacturer or wholesaler from providing any financial assistance to any retailer (O.R.S. section 471.465).

In 1978, Miller, Lancaster and other tavern owners in Oregon (the retailers) sued the OLCC and several wholesalers of beer and wine, contending that certain regulations promulgated by the OLCC, specifically Oregon Administrative Rules section 845-10-210 and 845-06-090 (1980)[1] have the effect of stabilizing and maintaining the prices of beer and wine in

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[1] The challenged regulations read as follows:

Oregon Administrative Rule 845-10-210:

Price Posting.

(1) Posting of malt beverage prices:

(a) Licensees of the Commission engaged in the business of soliciting the sale of, selling or distributing malt beverages for resale within the State of Oregon shall file with the Commission at its Portland office a written schedule in three copies of prices to be charged for all such beverages offered for sale within the state. The prices shall be uniform for the same class trade buyers and shall set forth:

(A) All brands and types of products offered for sale,

(B) The delivered sale price for each size container to retail licensees,

(Footnote continued on next page)

Oregon in violation of the Sherman Act, 15 U.S.C. section 1, *et*

(Footnote continued from previous page)

(C) Prices or maximum allowances or discounts to wholesale licensees, and

(D) Any allowance granted for return containers.

All price postings shall be consistent as between the various packages and containers offered for sale. No price postings involving quantity discounts shall be made.

(b) The Commission may reject any price posting which is in violation of any of its rules. . . .

(c) Unless rejected by the Commission, prices shall be effective on the tenth day following receipt of the posting at the Portland office of the Commission. . . .

(d) All postings reflecting a price decrease, when accepted, shall remain in effect for 180 days after the effective date of the posting. The Commission, at its discretion, may waive the 180-day period to allow for price increases based upon conditions which in its opinion warrant the increases.

(2) Posting of wine prices:

(a) Licensees of the Commission engaged in the business of soliciting sales of, selling or distributing wine for resale within the State of Oregon shall file with the Commission at its Portland office a written schedule in two copies of prices to be charged by such licensee for all wine offered for sale within the state. The prices shall be uniform for the sale class of trade buyers and shall set forth:

(A) All brands, classes and kinds of wine offered for sale, and

(B) The delivered sale price of each size container to retail licensees.

Prices shall be the same for one container as for each like container in any quantity comprising a sale, order or delivery. No allowance shall be made for return of containers and a wholesale licensee shall not purchase used containers from a retail licensee.

(b) The Commission may reject any price posting which is in violation of any of its rules. . . .

(c) Unless rejected by the Commission, prices shall be effective on the tenth day following receipt of the posting at the Portland office of the Commission. . . .

(d) All postings reflecting a price decrease, when accepted, shall remain in effect for 30 days after the effective date of the

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seq.[2] The plaintiffs objected to the following four features of the rules: the prohibition of quantity discounts; the requirement that licensees post prices ten days prior to their effective dates; the requirement that price decreases generally remain effective after posting for a period of 180 days for malt beverages and 30 days for wine; and the requirement that the posted price be the delivered price regardless of transportation costs. The retailers sought declaratory and injunctive relief restraining the OLCC from enforcing the regulations.

In 1979, the district court stayed proceedings to allow the Oregon courts to review the validity of the challenged regulations with respect to the OLCC's enabling legislation. The Oregon Court of Appeals held that the regulations were valid and reasonably designed to further statutory purposes. *Miller v. Oregon Liquor Control Commission*, 42 Or.App. 555, 600 P.2d 954 (1979) (*Miller I*).

In 1980, the district court granted defendants' motion to dismiss the retailers' federal suit on the ground that Oregon's

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posting. The Commission, at its discretion, may waive the 30-day period to allow for price increases based upon conditions which in its opinion warrant the increases.

Oregon Administrative Rule 845-06-090:

Transportation by licensed retailer from licensed wholesaler premises. A licensed retailer of malt beverages or of wine who is operating under a restraurant license, package store license, retail malt beverage license or dispenser license may transport, or have transported by the licensed retailer's employee or by a common carrier, from the licensed wholesaler premises to the licensed retailer by the licensed wholesaler. The purchase price of such malt beverages or wine shall be the price posted therefor, pursuant to section [845-10-210] hereof, for the trade zone at the licensed retailer premises. –

[2] Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several States, or with foreign nations, is declared to be illegal. . . ."

involvement in the regulation and control of the liquor industry was sufficient to establish immunity from federal antitrust law under the state action exemption first articulated by the Supreme Court in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). On appeal, this court reversed the district court's dismissal, holding that Oregon's regulatory policy is not "actively supervised" by the state itself, which supervision the court considered necessary in order to invoke *Parker* immunity. *Miller v. Oregon Liquor Control Commission*, 688 F.2d 1222, 1227 (9th Cir. 1982) (*Miller II*). No opinion was expressed regarding the existence of an antitrust violation or the Twenty-first Amendment.

On remand, the plaintiffs moved for summary judgment. The defendants filed a cross-motion for summary judgment on the grounds that they had not engaged in a combination, conspiracy, or agreement in restraint of trade and that the regulations do not authorize or require any concerted activity. Defendants further argued that Oregon's enforcement of the regulations should be accorded state action immunity under *Parker v. Brown*, or be held valid under the Twenty-first Amendment to the United States Constitution.

The district court denied plaintiffs' motion, and granted the defendants' motion, holding that the regulation requiring wholesalers to publicly post their prices and adhere to those prices for certain periods of time do not conflict with federal antitrust policy since they only require "unilateral" action by individual wholesalers, rather than the concerted action necessary for a violation of the Sherman Act, 579 F.Supp. 116. The court determined that the regulations requiring the posted price to be the delivered price and forbidding quantity discounts conflicted with the Sherman Act, but nonetheless upheld them on the basis of *Parker* immunity, relying on certain intervening changes in Oregon law. The court's decision did not include a discussion of the applicability of the

Twenty-first Amendment. The court also held in favor of the wholesalers, because of the absence of any concerted activity on their part.

The plaintiff retailers appealed the district court's order granting summary judgment to defendants. They contended that the posting and post-off provisions and the delivered price rule[3] conflict with the Sherman Act because of the conduct they require, and that it is not necessary that a separate agreement in restraint of trade be formed in order to find a violation of the Sherman Act. The retailers further claim that the challenged regulations are not exempt from the Sherman Act under *Parker v. Brown* because the state does not actively supervise the prices set by the wholesalers and because the state has not articulated a policy to displace competition in the wholesale distribution of beer and wine. Finally, they argue that the Twenty-first Amendment does not save the regulations from a Sherman Act challenge.

The issues which must be decided are (1) whether the regulations effect a *per se* violation of the Sherman Act; (2) if they do, whether they fall within the *Parker* exemption; (3) and whether the Twenty-first Amendment saves the regulation from the antitrust challenge.

STANDARD OF REVIEW

This court reviews a grant of summary judgment *de novo* "to determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986).

ANTITRUST ISSUE

The analytical framework that structures the approach to the antitrust issue is set forth in *Rice v. Norman Williams Co.*, 458 U.S. 654, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982).

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[3] The quantity discount rule is not challenged on appeal.

> In determining whether the Sherman Act pre-empts a state statute, we apply principles similar to those which we employ in considering whether any state statute is pre-empted by a federal statute pursuant to the Supremacy Clause. As in the typical pre-emption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute. A state regulatory scheme is not pre-empted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not pre-empted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect.
>
> A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy.

Id. at 659, 102 S.Ct. at 3298 (citations omitted). The court went on to add the following:

> [A] state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under section 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation.

Id. at 661, 102 S.Ct. at 3300.

The general issue here is therefore whether the Oregon regulations effect a *per se* violation of the Sherman Act. "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for

their use." *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). Such agreements or practices are deemed unlawful *per se* and require no further factual inquiry under the "rule of reason" generally applied in Sherman Act cases. *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8, 99 S.Ct. 1551, 1556, 60 L.Ed.2d 1 (1979).

An agreement to adhere to previously announced prices and terms of sale is unlawful *per se* under the Sherman Act, "even though advance price announcements are perfectly lawful and even though the particular prices and terms were not themselves fixed by private agreement." *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647, 100 S.Ct. 1925, 1928, 64 L.Ed.2d 580 (1980) (*per curiam*), *discussing Sugar Institute v. United States*, 297 U.S. 553, 56 S.Ct. 629, 80 L.Ed. 859 (1936). It is no defense that the prices fixed are themselves reasonable. *Id.*; *see also Northern California Pharmaceutical Assoc. v. United States*, 306 F.2d 379, 385 (9th Cir. 1962) ("there is no defense to *price-fixing* on the ground that it is reasonable"), *cert. denied*, 371 U.S. 862, 83 S.Ct. 119, 9 L.Ed.2d 99 (1962).

Section 1 of the Sherman Act is directed at prohibiting unreasonable restraints of trade effected by a contract, combination, or conspiracy among separate entities. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 104 S.Ct. 2731, 2740, 81 L.Ed.2d 628 (1984). It is therefore necessary to distinguish the independent activity of a single entity from a concerted effort by more than one entity to fix prices or otherwise restrain trade. *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984).

If the wholesale beer and wine distributors had entered into a private agreement to accomplish what is otherwise required by the Oregon regulations, there is no question that a

per se violation of Section 1 of the Sherman Act would be found. The appellees point out, however, that the wholesalers merely act unilaterally in response to the requirements of the regulations and that there is no agreement or concerted activity of any sort among them. They conclude that this absence of any concerted activity precludes the existence of any Sherman Act violation.

The appellees' treatment of this difficult issue oversimplifies it. While it is true that there is no agreement or concerted activity among the wholesalers, it can not be ignored that the challenged regulations facilitate the exchange of price information and require adherence to the publicly posted prices. In other words, the state compels activity that would otherwise be a *per se* violation of the Sherman Act. It is the presence of state compulsion that requires a more refined analysis than the one presented by the appellees. Simply ending the analysis because of the lack of concerted activity among the wholesalers fails to take into account the presence and effect of the state's involvement in the matter.

The Supreme Court recently addressed the unilateral versus concerted activity issue in a case involving an antitrust challenge to a municipality's regulation. In *Fisher v. City of Berkeley*, 475 U.S. 260, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986), the City enacted a rent control ordinance imposing strict rent ceilings on rental property. A group of landlords challenged the ordinance. The issue before the Court was whether the ordinance was pre-empted by federal antitrust laws. The landlords argued that the rent controls were a form of horizontal price-fixing and therefore were a *per se* violation of the Sherman Act. The Court rejected this argument and upheld the validity of the ordinance. The opinion discussed the critical distinction between unilateral and concerted action and held that there was no violation of the Sherman Act because of the absence of any concerted activity. "A restraint

imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law." *Id.*, 106 S.Ct. at 1049-1050.

The following language from this opinion is crucial to the issue in this case.

> Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of section 1. Certain restraints may be characterized as 'hybrid,' in that nonmarket mechanisms merely enforce private marketing decisions. See *Rice v. Norman Williams Co.*, 458 U.S. [654], at 665 [102 S.Ct. 3294, 3302, 73 L.Ed.2d 1042 (1982)], . . . (STEVENS, J., concurring in the judgment). Where private actors are thus granted "a degree of private regulatory power," *id.*, at 666, n. 1 [102 S.Ct., at 3302, n. 1] . . . , the regulatory scheme may be attacked under section 1. Indeed, this Court has twice found such hybrid restraints to violate the Sherman Act. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 [71 S.Ct. 745, 95 L.Ed. 1035 (1951); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 [100 S.Ct. 937, 63 L.Ed.2d 233] (1980) . . .

Id. at 1050.

As explained in Justice Stevens' concurring opinion in *Norman Williams*, there are three types of restraints on competition—purely private, purely public, and hybrid. The purely private restraint is clearly not involved in this case because of the state's regulations. The issue therefore narrows itself to whether the Oregon regulations are a hybrid restraint or a purely public restraint. The resolution of this issue determines whether the regulations violate the Sherman Act.

An examination of *Schwegmann* and *Midcal* adds light to this issue. In *Schwegmann*, the liquor retailer petitioner had refused to agree to a retail price maintenance provision with

two liquor distributors. The distributors sought to enjoin the retailer from selling their products at less than the minimum prices fixed in their contracts with other retailers. At that time, a Louisiana statute permitted product distributors to enforce retail price maintenance provisions against contracting retailers and non-contracting retailers. Thus, if a distributor and single retailer entered into a contract fixing retail prices, all retailers were prohibited from selling below the price set by the contracting distributor and retailer. After finding that the statute went beyond the now-repealed Miller-Tydings Act, the Court held that the two liquor distributors had violated Section 1 of the Sherman Act when they attempted to hold the retailer to the prices fixed in other contracts.

In its discussion of *Schwegmann*, the Court in *Berkeley* stated:

> [U]nder the Louisiana statute, both the selection of minimum price levels and the exclusive power to enforce those levels were left to the discretion of distributors. While the petitioner-retailer in that case may have been legally required to adhere to the levels so selected, the involvement of his suppliers in setting those prices make it impossible to characterize the regulation as unilateral action by the State of Louisiana.

Berkeley, 106 S.Ct. at 1050.

In *Midcal*, California required all wine producers, wholesalers, and rectifiers to file fair trade contracts or price schedules with the state. If a wine producer did not set prices, wholesalers were required to post a price schedule for that product's brands. A wine merchant could sell wine only at those prices to a retailer. The Court held that this pricing system constituted resale price maintenance in violation of the Sherman Act. As in *Schwegmann*, the mere existence of legal compulsion did not transform a pricing scheme into uni-

lateral action by the state. The state had no direct control over the prices set by the private parties, and it did not review the reasonableness of those prices.

A comparison of *Schwegmann* and *Midcal* with this case leads to the conclusion that the Oregon regulations constitute a "hybrid" restraint in violation of the Sherman Act.[4] The argument that the regulations merely involve unilateral action must be rejected on two grounds. First, *Schwegmann* demonstrates that a showing of concerted activity among the Oregon wholesalers is not necessary to establish an antitrust violation. The mere fact that each wholesaler complies unilaterally with the regulations does not save an impermissible pricing scheme from an antitrust challenge. In *Schwegmann*, non-contracting retailers were compelled to comply unilaterally with a state-authorized pricing scheme, but the absence of concerted activity among the retailers was not a bar to a finding of a Sherman Act violation. Second, *Schwegmann*, and *Midcal* show that Oregon's actions are not unilateral. The regulations constitute a "hybrid" restraint because, as in those two cases, Oregon allows private parties to set the prices and does not review the reasonableness of those prices. It follows that this case is unlike the purely public restraint of Berkeley's regulatory scheme which removed the power to set rents from the landlords.

PARKER V. BROWN ISSUE

Having concluded that the Oregon regulations violate Section 1 of the Sherman Act, a decision must be made as to whether Oregon's involvement in the regulatory scheme is sufficient to establish antitrust immunity under *Parker v.*

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[4] However, we affirm the district court's holding in favor of the wholesalers. Although the wholesalers are participants in a regulatory scheme effecting an antitrust violation, there is no evidence of concerted action on their part, "[T]here can be no liability under [sec.] 1 in the absence of an agreement." *Berkeley*, 106 S.Ct. at 1049.

Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). In *Parker*, the Supreme Court held that the federal antitrust laws do not prohibit a state from imposing anticompetitive restraints on the marketplace. "The circumstances in which *Parker* immunity is available . . . to state agencies or officials regulating the conduct of private parties [is] defined most specifically by [the] decision in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., supra*, 445 U.S., at 97 [100 S.Ct., at 937] . . ." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 1727, 85 L.Ed.2d 36 (1985).[5] Under the test set forth in *Midcal*, the state agency must meet two standards in order to establish antitrust immunity. First, the challenged restraint must be " 'clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Midcal*, 445 U.S., at 105, 100 S.Ct., at 943 (citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978)); *see also Llewellyn v. Crothers*, 765 F.2d 769, 773 (9th Cir. 1985) (applying two-part *Midcal* test to de facto fee schedule established by Oregon agency).

In *Miller II* this court applied the *Midcal* test and held that the Oregon regulations do not fall within the *Parker* exemption because the state does not actively supervise the restraint. Regardless of whether or not we are bound by this prior ruling under the "law of the case" doctrine, there is no reason to depart from that holding. As stated in *Miller II*:

> Oregon "neither establishes prices nor reviews the reasonableness of the price schedules . . . [nor does it]

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[5] *Southern Motor Carriers* rebuts the state's assertion that under *Hoover v. Ronwin*, 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984), it need not show "clear articulation" or "active supervision". In *Hoover*, the Court stated: "Where the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of 'clear articulation' and 'active supervision.' " *Id.* at 569, 104 S.Ct. at 1995.

> monitor market conditions or engage in any 'pointed reexamination' of the program." *Midcal*, *supra*, 445 U.S. at 105-06 [100 S.Ct. at 943-44], ... Oregon mandates the posting of prices to be charged by each wholesaler, but does not in any way review the reasonableness of the prices set. While the commission "may reject any price posting which is in violation of any of its rules," Rule 210(1)(b), the effect of that rule is simply to effectuate the price posting and the prohibitions on quantity discounts and transportation allowances. It does not provide for government establishment or review of the prices themselves. . . . Oregon merely authorizes and enforces the disputed pricing practices. *See Midcal*, supra, 445 U.S. at 105 [100 S.Ct. at 943], ...

Miller II, 688 F.2d at 1226-1227.

There have been no material changes in Oregon's regulations scheme since *Miller II*, and we likewise conclude that Oregon has failed to satisfy the second part of the two part *Midcal* test.[6] Because the failure to show active supervision, by itself, removes the *Parker* exemption, there is no need to decide whether the state meets the first part of the test.

TWENTY-FIRST AMENDMENT ISSUE

Since the Parker exemption does not apply, it is necessary to turn to the final and dispositive issue of whether the Twenty-first Amendment shields the challenged regulations. The Supreme Court has stated the issue as " 'whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.' " *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275-76,

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[6] Oregon states that each agency is required by law to review the impact of its rules and that Oregon's "sunset review law" reviews the necessity of the existence of an agency. It argues that these measures constitute active supervision. This argument is without merit because neither means of review sets the actual prices or determines the reasonableness of those prices.

104 S.Ct. 3049, 3057-58, 82 L.Ed.2d 200 (1984) (*quoting Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714, 104 S.Ct. 2694, 2708, 81 L.Ed.2d 580 (1984)).

In order to resolve this issue, it is necessary to consider and compare the conflicting federal and state interests. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, ___ U.S. ___, 106 S.Ct. 2080, 2087, 90 L.Ed.2d 552 (1986); *see Stein Distribution Co. v. Department of the Treasury Bureau of Alcohol, Tobacco & Firearms*, 779 F.2d 1407, 1410 (9th Cir. 1986). As the court said in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110, 100 S.Ct. 937, 946, 63 L.Ed.2d 233 (1980), "there is no bright line between federal and state powers over liquor. . . . The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.' "

The federal interest embodied in the Sherman Act is well-recognized and substantial. The Sherman Act has been described as "the Magna Carta of free enterprise," *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972), and Congress " 'exercis[ed] all the power it possessed' under the Commerce Clause when it approved the Sherman Act," *Midcal*, 445 U.S. at 111, 100 S.Ct. at 946 (citations omitted). As we have noted, the Oregon regulations involved in this case compel activity that would constitute a per se violation of the Sherman Act.

Against this substantial impairment of the strong federal interest in favor of competition must be weighed the state's interest the challenged regulations serve.[7] The parties dis-

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[7] Defendants argue the Oregon Court of Appeals' decision in *Miller v. Oregon Liquor Control Commission*, 42 Or.App. 555, 600 P.2d 954 (1979), determines the extent to which the challenged regulations serve interests under the Twenty-first Amendment. The state court's decision, however, determined only that the regulations were reasonably related to state stat-

(Footnote continued on next page)

agree as to the extent to which these regulations advance the interests Oregon avows and the closeness of these avowed interests to those the Twenty-first Amendment protects.

The district court did not reach this issue because it decided the case upon another ground. Since we have rejected the ground upon which the lower court's decision rested and since the Twenty-first Amendment issue may ultimately rest upon findings and conclusions having a large factual component, we remand this issue for the trial court's initial determination.

REVERSED AND REMANDED.

(Footnote continued from previous page)

utory purposes, and therefore that there was a valid exercise of the administrative agency's authority. The issues under the Twenty-first Amendment are quite different. The court must examine both the federal interest and the state interest and resolve the conflict between them in accordance with what is at stake for each in reality in the concrete case—the court must examine the purpose of the federal rule and the extent to which the state rule frustrates that purpose; the avowed purposes of the state rule and their closeness to the interest the Twenty-first Amendment serve; and the extent to which, in reality, the state rule serves its avowed purposes. *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 108-14, 100 S.Ct. 937, 944-48, 63 L.Ed.2d 233 (1980).

APPENDIX B

Elsie Viola MILLER and
Oretta Bernice Lancaster,
doing business as the Junction Cafe and Tavern;
Taylor's Coffee Shop, Inc.,
dba Rennie's Landing;
Wian, Inc., dba Barney's Cable;
individually and as representatives
of others similarly situated;
Plaintiffs;

v.

William H. HEDLUND,
Sylvia S. Bedingfield,
Reuben A. Worster,
Stan Auderkirk, and Jill Thorne,
individually in their representative
capacities as the Commissioners of the
Oregon Liquor Control Commission;
C. Dean Smith,
individually in his capacity as Administrator for the
Oregon Liquor Control Commission;
Oregon Beer and Wine Distributors Association, Inc.;
Spear Beverage Co., Inc.;
Coast Distributors, Inc.; and
United Beer Distributing Company;
individually and as representatives of
others similarly situated;
Defendants.

Civ. No. 78-259-FR.

United States District Court,
D. Oregon.

Jan. 24, 1984.

[Names of counsel omitted in printing]

OPINION AND ORDER

FRYE, District Judge:

The matters before the court are plaintiffs' motion for summary judgment, state defendants' motion for summary judgment, and private defendants' motion for summary judgment.

This case involves an antitrust challenge to certain regulations promulgated by the Oregon Liquor Control Commission (OLCC). The regulations place limitations on the manner in which liquor wholesalers may sell wine and beer to retail customers. Plaintiffs are establishments that purchase beer and wine from wholesalers and sell beer and wine at retail. One group of defendants is composed of the Commissioners of the OLCC (the state defendants), another of beer and wine wholesalers (the private defendants). Plaintiffs allege that the regulations have the effect of stabilizing and maintaining the prices of beer and wine in the State of Oregon. Plaintiffs have moved for summary judgment, seeking declaratory and injunctive relief restraining the state defendants from enforcing the regulations at issue. The state and private defendants also have filed motions for summary judgment.

The challenged regulations require beer and wine wholesalers to do several things. Under OAR 845-10-210(1)(a), wholesalers must file with the OLCC a written schedule of prices at which they will sell beer at wholesale within the state. These prices must be uniform with classes of trade buyers. The prices must be for delivered product; that is, the wholesale price to a given customer is constant without regard to transportation considerations. Quantity discounts are prohibited. Under paragraph (c) of this regulation, prices so posted become effective ten days after receipt by the OLCC, unless rejected by the OLCC under paragraph (b). Prices may

not be changed except in accordance with OLCC rules. Under paragraph (d), if a price filing reflects a decrease in price, the posting, and hence the price, must remain in effect for 90 days, unless the OLCC, in its discretion, waives the 90-day period for certain reasons set out in the regulation. OAR 845-10-210(2) sets up similar restrictions for the wholesale distribution of wine, except that the "post-off" period—i.e., the period of time for which a decrease in price must remain posted—is 30 days rather than 90 days.

In their motion for summary judgment plaintiffs seek an injunction restraining enforcement of these regulations on the ground that they are void by reason of their conflict with and preemption by the Sherman Act, 15 U.S.C. § 1, pursuant to the Supremacy Clause of the United States Constitution. The state defendants seek summary judgment on the grounds that (1) the regulations are valid regulations of interstate commerce under the 21st amendment to the United States Constitution; (2) the regulations constitute "state action" which is immune from the Sherman Act under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct 307, 87 L.Ed. 315 (1943), and (3) the state defendants have not engaged in a combination, conspiracy, or agreement in restraint of trade, and the regulations do not require or authorize such a combination on the part of private parties. The private defendants seek summary judgment based on the absence of any showing by the private defendants to restrain trade.

The parties are in agreement that the issues present questions of law appropriate for resolution on a motion for summary judgment.

ARE THE REGULATIONS PREEMPTED BY THE SHERMAN ACT?

In order to prevail, plaintiffs must show that the regulations are preempted by the Sherman Act. In *Rice v. Norman*

Williams Co., 458 U.S. 654, 102 S.Ct 3294, 73 L.Ed.2d 1042 (1982), the Supreme Court indicated that state regulatory schemes are only preempted by the Sherman Act in those cases where compliance with the scheme necessarily leads to an antitrust violation:

> In determining whether the Sherman Act preempts a state statute, we apply principles similar to those which we employ in considering whether any state statute is preempted by a federal statute pursuant to the Supremacy Clause. As in the typical preemption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute. A state regulatory scheme is not preempted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect.
>
> A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy. In *California Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), we examined a statute that *required* members of the California wine industry to file fair trade contracts or price schedules with the State, and provided that if a wine producer had not set prices through a fair trade contract, wholesalers *must* post a resale price schedule for that producer's brands. We held that the statute facially conflicted with the Sherman Act because it *mandated* resale price maintenance, an activity that has long been regarded as a *per se* violation of the Sherman Act.
>
> By contrast, in *Seagram & Sons v. Hostetter*, [384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed.2d 336 (1966)], we rejected a facial attack upon § 9 of New York's Alcoholic Beverage Control Law, which required retailers

> and wholesalers to file monthly price schedules with the State Liquor Authority accompanied by an affirmation that the prices charged were no higher than the lowest price at which sales were made anywhere in the United States during the preceding month. *Id.*, 384 U.S. at 39-40, 86 S.Ct. at 1257-1258. The Court found no clear repugnancy between § 9 and the federal antitrust laws. . . .
>
> Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract.

Id. at 3299-3300 (citations, footnotes omitted).

The plaintiffs argue that the challenged regulations require behavior that is a *per se* violation of the Sherman Act. *See The Sugar Institute, Inc. v. United States*, 297 U.S. 553, 56 S.Ct. 629, 80 L.Ed. 859 (1936) (price posting plus agreement to adhere to posted prices); *see Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948) (quoting only delivered prices); *see United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) (post-off provisions). The state defendants argue that section 1 of the Sherman Act only reaches contracts, combinations, or conspiracies that restrain trade; and hence, that the regulations do not necessarily lead to an antitrust violation unless they require some inter-wholesaler agreement. Because the regulations only require unilateral wholesaler conduct and because the regulations neither com-

pel nor authorize inter-wholesaler agreements to restrain trade, the regulations are not subject to preemption.

Defendants rely primarily upon *Enrico's, Inc. v. Rice*, 551 F.Supp. 511 (N.D. Cal. 1982), *Serlin Wine and Spirit Merchants, Inc. v. Healy*, 512 F.Supp. 936 (D. Conn. 1981), *aff'd sub nom. Morgan v. Division of Liquor Control*, 664 F.2d 353 (2nd Cir. 1981), and *United States Brewers Association v. Healy*, 532 F.Supp 1312 (D. Conn. 1982), *rev'd on other grounds* 692 F.2d 275 (2nd Cir. 1982). *Enrico's* involves 4 Cal. Admin. Code § 100, which *inter alia* requires wholesalers of distilled spirits to post prices and to adhere to the posted prices for at least a month, and which allows quantity discounts only according to a regulatory formula. The court in *Enrico's* held that these regulations were not preempted by the Sherman Act because of the lack of any requirement or authorization in the regulations of inter-wholesaler agreements. The court specifically rejected the argument made in the present case by plaintiffs that the regulations themselves constitute the required agreement or combination. 551 F.Supp. at 513. The *Enrico's* court also specifically rejected the reasoning of *Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Board*, 136 Cal.App.3d 829, 186 Cal.Rptr. 552 (1982), *cert. denied* ___ U.S. ___, 104 S.Ct. 193, 78 L.Ed.2d 170 (1983), relied upon by plaintiffs and discussed below. *Serlin v. Healy*, *supra*, deals with similar Connecticut regulations requiring manufacturers and out-of-state shippers to post prices for the next month, and further requiring wholesalers and retailers to sell for no less than a "cost" figure determined by the regulations according to a formula from this initial price posting. Both the district court and the Second Circuit found the regulations immune from antitrust preemption because the statutory scheme "[does] not authorize or compel private parties to enter contracts or combinations to fix prices in violation of § 1 of the Sherman Act." *Morgan*

supra, 664 F.2d at 355.[1] Finally, *United States Brewers Association v. Healy*, *supra*, deals with a number of Connecticut regulations, including price posting requirements, discount prohibitions, prohibitions on discriminating between customers, minimum mark-up requirements, and mandated exclusive territories. Again, finding that the regulations did not compel or authorize any agreement between private parties, the court held that they were not preempted by the Sherman Act.

Plaintiffs place primary reliance on *Lewis-Westco*, *supra*. There, the California Court of Appeals struck down certain California regulations as preempted by the Sherman Act. The regulations required manufacturers, rectifiers, and wholesalers to post prices and to sell only at the posted prices. The appeals court felt that its ruling was compelled by the California Supreme Court's earlier decision in *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 476 (1978), and its own earlier decision in *Midcal Aluminum v. Rice*, 90 Cal.App.3d 979, 153 Cal.Rptr. 757 (1979), *aff'd sub nom. California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). However, the *Rice* and *Midcal* cases deal with regulations that require all sellers at a given distribution level to sell at least at a minimum price (*Rice*) or at a price set by producers themselves (*Midcal*). Because this scheme effectively forced all sellers on a given distribution level to sell at one set price, the *Rice* and *Midcal* courts had little difficulty finding that the regulations mandated price fixing, which clearly constitutes a *per se* violation of the Sherman Act. The California courts had no need to address the "unilateral action" argument made by the state defendants here because the regulations at issue in the California cases mandated mul-

[1] These courts also held that the State of Connecticut was entitled to *Parker* immunity for the regulations.

tilateral compliance with a price-setting scheme. In *Lewis-Westco*, the court did not directly address the unilateral action argument, although it clearly recognized the important unilateral v. multilateral distinction in the regulations before it as opposed to the regulations at issue in *Rice* and *Midcal*. The *Lewis-Westco* court reasoned that because the price posting regulations had the *effect* of stabilizing prices, the regulations were subject to preemption. However, this analysis seems to ignore the teachings of *Rice v. Norman Williams*, *supra*, that a statutory scheme "is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive *effect*." 102 S.Ct. at 3299 (emphasis added). It is only a *per se* violation of the Sherman Act if a *combination* exists for the purpose and with the effect of stabilizing prices. Because the price posting statute requires only unilateral wholesaler action, the necessary element of agreement is lacking, and hence the Oregon price posting scheme does not authorize or mandate conduct that necessarily constitutes a violation of the antitrust laws. As such, the regulations are not subject to preemption.[2]

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[2] At first glance, another case upon which plaintiffs rely, *Knudsen Corp. v. Nevada State Dairy Commission*, 676 F.2d 374 (9th Cir. 1982), appears more troublesome to defendants' position. There, the Ninth Circuit upheld a district court's injunction against certain Nevada regulations over dairy product pricing. Under the Nevada scheme, a dairy producer must file lists of wholesale, retail, and distributor prices, which do not become effective until seven days after filing. The filed prices are made public, and sales cannot be made below the filed price, or below cost. The standard of review used in the case was whether the district court abused its discretion in enjoining enforcement of the regulations; the Ninth Circuit did not consider the legal issues involved *de novo*. However, the court seemed to indicate that if the effect of the regulations was to lessen price competition, then they could be enjoined. The impact of this ruling is uncertain. On the one hand, the court did not say that the effect of the regulations was a *per se* violation of the Sherman Act; rather, a hearing on the merits was required to determine whether in fact the regulations had an anticompetitive effect. (This appears to indicate that, even were *Knudsen* considered controlling, plaintiffs would not be entitled to summary judgment at this time.) On the other hand, the court cited no cases in support of the proposition that effect is

(Footnote continued on next page)

This result is a common sense result. The purpose of the Sherman Act is to restrain businesses from agreeing, conspiring, or combining for the purpose of thwarting free market mechanisms. While the regulations at issue in this case do restrict the ability of wholesalers to price their products with absolute freedom, there is no reason why the wholesale price of beer and wine in Oregon should not gravitate down to its more competitive level, absent some sort of *private* agreement to use the regulations for anticompetitive purposes. It may be that beer and wine wholesalers in Oregon do in fact reach express or tacit agreements that involve use of the regulations for the purposes of stabilizing prices. If so, their actions would be in violation of the Sherman Act; but the illegality is a result of their *agreement* to combine for the purpose of restraining trade, and is not mandated or authorized by the regulations themselves.

Thus far the court's opinion relates to the price posting and post-off provisions of the regulations. These provisions are not preempted because as to the essential activity to which they relate—pricing—the provisions do not require inter-wholesaler agreement or concerted action. Each wholesaler is free to set his own prices, without regard to the prices set by other wholesalers. A different situation is presented by the other two provisions, the prohibition against quantity discounts and the delivered price rule.

There are limits to the unilateral action argument advanced by the state defendants. Taken to its extreme, the argument would uphold any state regulatory scheme that

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sufficient, and could not have relied on *Rice v. Norman Williams, supra*, because *Rice* was decided after the *Knudsen* decision was handed down. This fact, plus the fact that the *Knudsen* court was reviewing on an "abuse of discretion" standard, and the differences between the regulations at issue there and in the present case, limits the authority of *Knudsen* for purposes of analysis in the present case.

mandated any private action, because the regulated actors could argue that because there exists no inter-actor agreement or combination, no *per se* violation occurs, and therefore the scheme cannot be preempted. The limit to the argument comes at a point between the price posting/post-off rules on the one hand, and the delivered price/quantity discount rules on the other. Although the former rules do not require wholesalers to act in concert with respect to the prices they set, the latter rules do require all wholesalers to adhere to identical horizontal restraints. By requiring all wholesalers to adhere to the delivered price/quantity discount rules, the State of Oregon forces all wholesalers to agree to abide by these restraints as a condition for continuing to do business, much as was the case in *Midcal*. Thus the element of agreement missing with respect to the price posting/post-off rules is present here. Hence, the delivered price/quantity discount rules may mandate conduct that is a *per se* violation of the Sherman Act. See *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980).[3]

Because the delivered price/quantity discount rules may mandate conduct constituting a *per se* Sherman Act violation, the court must address the state defendants' contentions that these rules are shielded from the Sherman Act by the *Parker*

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[3] This distinction is much less tenuous than appears at first glance. The price posting/post-off rules only require unilateral action from a wholesaler, the setting by the wholesaler of his own price, and adherence to that price. Since all wholesalers must adhere to the prices they individually set, there is an element of agreement mandated by the regulations. Standing alone, however, it is not an antitrust violation for a number of wholesalers to adhere to their own publically [*sic*] -known prices. It is only a violation if the wholesalers adhere to their own publically [*sic*] -known prices and do so with knowledge of the prices of the other wholesalers and with the agreement of other wholesalers that they will adhere to their prices. These elements, however, are neither mandated nor authorized by the price-posting/post-off rules.

state action doctrine and section 2 of the Twenty-First Amendment.

The state action issue has arisen previously in this case. Earlier this court dismissed plaintiffs' claims, holding that the regulations at issue were entitled to immunity from the federal antitrust laws under *Parker* and its progeny. This ruling was reversed by the Ninth Circuit in *Miller v. OLCC*, 688 F.2d 1222 (9th Cir. 1982). The parties dispute the effect of this ruling on the case in its present posture. Plaintiffs contend that this court is foreclosed from reconsidering the state defendants' state action arguments; defendants contend that the holding in *Miller* was narrower than plaintiffs believe, and that certain statutory changes since the decision in *Miller* make it more likely that the state can now meet the *Midcal* "active supervision" test.

Although the court is hesitant to examine the state action issue again after the Ninth Circuit's decision, the court is uncertain as to whether the opinion covers the case in its present posture. First, *Miller* dealt with all four of the challenged regulations, but the case as it presently stands presents the state action issue only with respect to the quantity discount/delivered price rules. Second, the *Miller* opinion stressed the fact that if the price posting provisions did in fact mandate or authorize conduct violative of the Sherman Act (an issue upon which the court expressly reserved judgment), then *Parker* immunity would be unavailable because the OLCC did not review the reasonableness of the posted prices, as required by *Midcal*. Indeed, a fair reading of the *Miller* opinion indicates that it is concerned with the price posting provisions rather than with the delivered price/quantity discount rules. Third, there is language in the *Miller* opinion itself that might support the view that, as to these remaining rules, state action immunity is available. Finally, certain statutory and administrative changes have occurred in Oregon

since the *Miller* opinion which might impact on the question of whether Oregon adequately supervises the regulatory scheme at issue. For all of these reasons, the court will examine whether the quantity discount/delivered price rules are entitled to *Parker* immunity.

Midcal, supra, sets out a two-part test for determining whether *Parker* immunity should apply to a state scheme:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised by the state itself."

445 U.S. at 105, 100 S.Ct. at 943, *quoting City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 at 410, 98 S.Ct. 1123 at 1135, 55 L.Ed.2d 364 (opinion of Brennan, J.). In *Miller*, the Ninth Circuit held that the "active supervision" prong of the test was not met in the present case because

> . . . Oregon "neither establishes prices nor reviews the reasonableness of the price schedules . . . [nor does it] monitor market conditions or engage in any 'pointed reexamination' of the program." *Midcal, supra*, 445 U.S. at 105-06, 100 S.Ct. at 943. Oregon mandates the posting of prices to be charged by each wholesaler, but does not in any way review the reasonableness of the prices set. While the commission "may reject any price posting which is in violation of any of its rules," Rule 210(1)(b), the effect of that rule is simply to effectuate the price posting and the prohibitions on quantity discounts and transportation allowances. It does not provide for government establishment or review of the prices themselves. . . . Oregon merely authorizes and enforces the disputed pricing practices. *See Midcal, supra*, 445 U.S. at 105, 100 S.Ct. at 943. It does not " 'displace unfettered business freedom' with its own power." *Id.* at 106 n. 9, 100 S.Ct. at 943 n. 9, *quoting New Motor Vehicle Bd. v. Orrin W. Fox Co., supra*, 439 U.S. 96, at 109, 99 S.Ct. 406 at 411-412, 58 L.Ed.2d 361.

Miller, supra, 688 F.2d at 1226-27. Presently at issue, however, are two rules with no explicit pricing function; that is, these rules do not enforce wholesaler-set prices, but rather mandate restraints that make irrelevant factors that would ordinarily influence prices in an unregulated market. It is much less clear how to apply the "active supervision" test to rules such as these.

This court recently examined the *Parker* doctrine in a different factual context. *Llewellyn v. Crothers*, Civ. No. 81-6462FR (D. Ore. April 20, 1983). There, the court determined that the legal issues inherent in the *Parker* doctrine should be resolved in light of the theoretical basis for the doctrine: the notion of federalism. The *Parker* doctrine exists because

> [W]e find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directly by its legislature.
>
> . . . .
>
> True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. [Citation omitted] . . . . Here the state command . . . is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken as a prohibition of individual and not state action. . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it . . ., in the execution of governmental policy.

Parker, supra, 317 U.S. at 351-52, 63 S.Ct. at 313-14.

Against the federalism background of the *Parker* decision, the court finds that the delivered price/quantity discount rules fall within the scope of the *Parker* doctrine and are entitled to state action immunity. First, the rules are clearly articulated and affirmatively expressed as state policy. In *Llewellyn, supra*, this court held that

> an action with an anticompetitive effect taken by a state agency will be accorded *Parker* immunity if it can be said that the anticompetitive effect is a necessary or foreseeable result of the agency's execution of a statutory directive or policy. "The antitrust court should require only that the result of an agency's act or decision be of the sort contemplated by state anticompetitive policy." [P. Areeda, *Antitrust Immunity for "State Action" after Lafayette*, 95 Harv. L. Rev. 435 at 453 (1981)].

Id. at 14. Here, the rules at issue were promulgated to enforce the statutory prohibitions against financial assistance by wholesalers of liquor to retailers of liquor. ORS 471.415, 471.465. Although the relation between the prohibition against financial assistance and the regulations at issue is said by plaintiffs to be tenuous, the Oregon courts have held that the rules reasonably advance the purposes of the statutes. *Miller v. OLCC*, 42 Or. App. 555, 600 P.2d 954 (1979). More importantly, it is foreseeable that the financial assistance statute may have an anticompetitive effect. Hence, the rules meet the first prong of the *Midcal* test.

As to the second prong—active supervision—the court finds that the rules also meet the test. The importance of the active supervision test has been described in the following way:

> The existence of a state action immunity enables states, like the federal government itself, to define areas inappropriate for market control. Moreover, the adequate supervision criterion ensures that state-federal conflict will be avoided in those areas in which the state has demonstrated its commitment to a program through its exercise of regulatory oversight. At the same time, it guarantees that when the Sherman Act is set aside, private firms are not left to their own devices. Rather, immunity will be granted only when the state has substituted its own supervision for the economic constraints of the competitive market.

Miller, supra, 688 F.2d at 1225, *quoting* 1 P. Areeda & D. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 213 at 73 (1978) (footnotes omitted). Here, active state supervision exists because the rules at issue were promulgated by the state agency itself, and imposed on wholesalers and retailers. This is not a case where the state merely authorizes private anticompetitive action or declares private anticompetitive actions to be lawful. The regulations at issue do not authorize private parties to agree upon and effectuate non-price horizontal restraints; rather, the restraints are imposed upon the private parties by the state. Finally, since the decision in *Miller*, Oregon has enacted comprehensive legislation requiring periodic review by all state agencies of the economic effect of their regulations. ORS 183.545, 183.550. The OLCC is currently scheduled to review the regulations at issue in the summer of 1984. This is the sort of monitoring of market conditions and "pointed reexamination" of the program required to meet the active supervision test.

With respect to the plaintiffs' motion for injunctive and declaratory relief, the court holds that (1) the price posting and post-off rules are not subject to preemption by the Sherman Act because they do not mandate or authorize conduct constituting a *per se* antitrust violation, and (2) insofar as the delivered price/quantity discount rules may mandate or authorize such a *per se* violation, they are nevertheless entitled to immunity under the *Parker* doctrine. The plaintiffs' motion for summary judgment is therefore denied, and the state defendants' cross motion for summary judgment is granted.

The remaining issue is the private defendants' motion for summary judgment on the grounds "that there are no genuine issues of matrial [sic] facts concerning the absence of any concerted activity by these moving defendants." Private

Defendants' Cross-Motion for Summary Judgment at 2. As stated earlier, it is possible that, although the regulations at issue do not mandate or authorize any inter-wholesaler combinations, wholesalers nevertheless do *in fact* use the regulations for anticompetitive purposes. In their motion, the private defendants contend that plaintiffs have submitted no evidence of any inter-wholesaler combination except (1) a summary of wholesale prices for Miller and Budweiser beer and (2) an affidavit of Albert Usher stating that in his opinion the price posting rules cause price uniformity.

Because the parties (and particularly the plaintiffs) have expended great effort on the preemption issue and very little effort on this issue, the court declines to rule on the private defendants' motion for summary judgment. Instead, it is ordered that plaintiffs' file within 20 days of the date of this order a memorandum of law and supporting materials specifically addressing the private defendants' motion. The private defendants shall within 15 days thereafter respond, at which time the court will decide the issue. If the plaintiffs file nothing within 20 days, the court will grant the private defendants' motions.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. Plaintiffs' motion for summary judgment is DENIED.

2. State defendants' motion for summary judgment is GRANTED.

3. Within 20 days of the date of this order plaintiffs shall file a memorandum of law with such supporting materials as they deem necessary and defendants shall respond within 15 days thereafter. The court will thereafter rule on private defendants' motion for summary judgment.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELSIE VIOLA MILLER, et al.,	)	
	)	
Plaintiffs-Appellants,	)	No. 84-3749
	)	
v.	)	
	)	
WILLIAM H. HEDLUND, et al.,	)	ORDER
	)	
Defendants-Appellees.	)	
	)	

Before: BROWNING, Chief Judge, ALARCON, Circuit Judge, and STEPHENS,* District Judge

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable Albert Lee Stephens, Jr., Chief Judge Emeritus, Central District of California, sitting by designation.

Supreme Court, U.S.
FILED
DEC 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-895 (2)

In the Supreme Court of the United States

OCTOBER TERM 1987

WILLIAM H. HEDLUND, et al.,

Petitioners,

v.

ELSIE VIOLA MILLER, et al.,

Respondents.

BRIEF OF RESPONDENT COAST DISTRIBUTORS, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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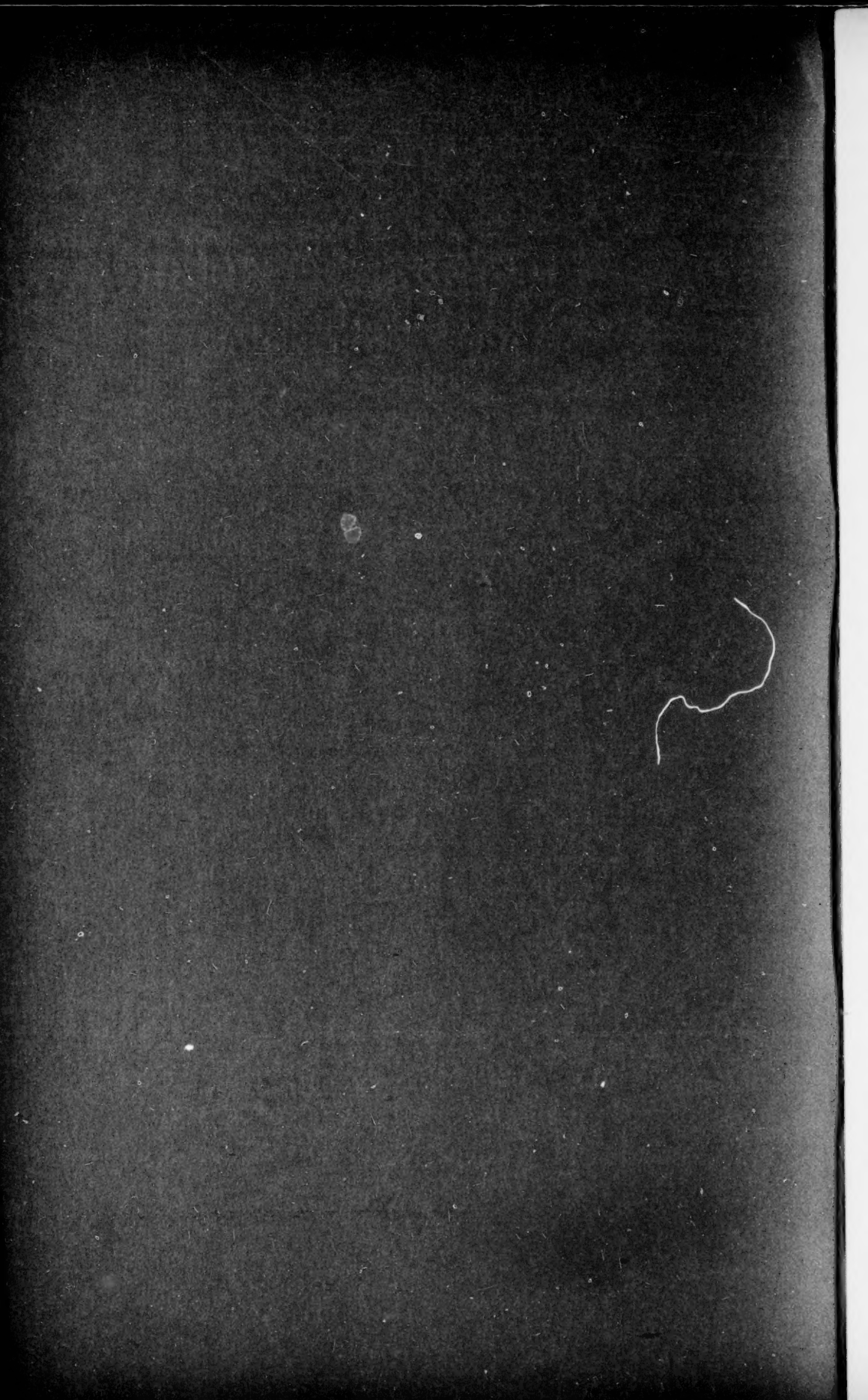

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BRIEF OF RESPONDENT COAST DISTRIBUTORS, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Respondent Coast Distributors, Inc. ("Coast"), a defendant below, submits this brief in support of the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals filed by the Administrator and Commissioners of the Oregon Liquor Control Commission of the State of Oregon. [1]

STATEMENT OF THE CASE

Coast adopts the Statement of the Case set forth in the Petition.

Coast supplements the Statement of the Case in the Petition as follows with regard to the rulings in the district court concerning the beer and wine distributors who were involved in the case.

In the district court Coast and several other distributors were named as defendants individually and as representatives of a purported class of other similarly situated distributors. No defendant class was ever certified. Appendix B to the Petition sets forth the January 24, 1984 order of the district court granting the state defendants' motion for summary judgment. *See* Petition, Appendix B at App-34. In that order, the district court reserved decision on the distributors' mo-

---

[1] Coast has no parent, subsidiary or affiliated corporations. Spear Beverage Co., also a named defendant below, was liquidated while the case was pending, and is no longer in existence.

tion for summary judgment, and allowed the plaintiffs 20 days to submit additional evidence of concerted action among the distributors. *Id.* The Court indicated that the evidence submitted by the plaintiffs up to that point was not sufficient to show any concerted action among the distributors, and that if the plaintiffs did not file additional evidence within 20 days, the Court would grant the distributors' motion. *Id.*

Following the order, the plaintiffs did not submit any additional evidence. Accordingly, on March 9, 1984, the district court entered judgment in favor of the distributors.

In the decision below, the Ninth Circuit affirmed the district court's judgment in favor of the distributors on the ground that "there is no evidence of concerted action" among the distributors. Petition, Appendix A at App-13 n. 4.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. The decision below is in direct conflict with decisions of the Second Circuit Court of Appeals, the New York Court of Appeals, the Minnesota Supreme Court, the Missouri Supreme Court and two United States District Courts on an important issue of constitutional law.

The Court below held the Oregon price posting rules to be a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1987), and therefore subject to preemption by that statute under the Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2. Petition, Appendix A at App-13. The Court then held that state

action immunity did not save the Oregon rules from preemption because of a lack of active supervision by the state. Petition, Appendix A at App-15.

The decision below holding the Oregon price posting rules to be a *per se* violation of Section 1 of the Sherman Act is in direct conflict with decisions of the Second Circuit Court of Appeals, the New York Court of Appeals, the Minnesota Supreme Court, the Missouri Supreme Court, and two United States District Courts, all holding that substantially similar price posting laws in other states are not a *per se* violation of Section 1 of the Sherman Act. The decision below also disagreed with the district court decision in this case.

In *Battipaglia* v. *New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985), the Second Circuit Court of Appeals upheld New York's price posting system against an antitrust challenge identical to that presented by the retailers in this case. The New York statute, N.Y. Alco. Bev. Cont. Law § 101-b (McKinney 1987), required liquor or wine wholesalers to publicly file their prices, adhere to those prices for a fixed period of time (subject to a three-day right to lower prices to meet competition) and offer those prices uniformly to all retailers. *Battipaglia*, 745 F.2d at 168.

Like the Ninth Circuit in this case, Judge Friendly, writing for the panel majority, examined whether the price posting law was preempted by the Sherman Act under the test set forth in *Rice* v. *Norman Williams Co.*, 458 U.S. 654 (1982). *Battipaglia*, 745 F.2d at 173;

Petition, Appendix A, App-7-8. Unlike the Ninth Circuit in this case, Judge Friendly found that the price posting law did not constitute a *per se* violation of the Sherman Act and therefore was not preempted by that statute. *Battipaglia*, 745 F.2d at 175.[2]

The New York Court of Appeals has also upheld the New York price posting statute against the same challenge presented in this case. *Admiral Wine & Liquor Co.* v. *State Liquor Authority*, 61 N.Y.2d 858, 462 N.E. 2d 146, 473 N.Y.S. 969 (1984). The Court held:

> Subdivision 3 of § 101-b of the Alcoholic Beverage Control Law does not violate the Sherman Antitrust Act .... Subdivision 3 of § 101-b ... is a price-posting statute, which simply requires the dealer to file with the State, on a monthly basis, a list of the prices the dealer himself has decided to charge for his products during that period with provision for a downward modification of that price. Subdivision 3 of § 101-b does not authorize anyone to determine retail prices for wine, nor does it bind other wholesalers as to the prices which they may charge their dealers.

Id. at 860-61, 462 N.E.2d at 146-47, 473 N.Y.S. at 970.

In *Intercontinental Packaging Co.* v. *Novack*, 348 N.W.2d 330 (Minn. 1984), the Minnesota Supreme Court upheld that state's liquor price posting system against the same antitrust challenge presented here.

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[2] In *Battipaglia*, Judge Friendly cited to the district court decision in this case, and described this case as concerning "Oregon price posting and adherence provisions substantially similar to New York's ...." *Battipaglia*, 745 F. Supp. at 173.

The Court employed the preemption analysis of *Rice* v. *Norman Williams Co.* and, like Judge Friendly in *Battipaglia*, found that there was no preemption of the state price posting law. The Court held:

> Enforcement of a state statute may be enjoined only if the statute on its face irreconcilably conflicts with federal antitrust policy. Since Minn. Stat. § 340.983 (1982) does not mandate conduct violative of the Sherman Act, the Sherman Act does not preempt the state regulatory system.

Intercontinental Packaging Co., 348 N.W.2d at 335.

In *Wine and Spirits Specialty, Inc.* v. *Daniel*, 666 S.W.2d 416 (Mo. 1984) *(en banc)*, the Missouri Supreme Court rejected a challenge to that state's price posting law identical to the challenge presented here. The Missouri statute required liquor wholesalers to post prices monthly, adhere to those prices, and avoid quantity and payment discounts in excess of one percent each. *Id.* at 417. The Missouri court analyzed the preemption question under *Rice* v. *Norman Williams Co. Id.* Like the courts in New York and Minnesota, but unlike the court below in this case, the Missouri court found that the price posting laws were not a *per se* violation of the Sherman Act:

> Initially, each wholesaler determines individually the price it will charge retailers. While the wholesalers are afforded the opportunity to change their prices, they are not so required; any change must be based on their independent judgment. The price posting laws neither authorize nor sanction individual wholesalers to contract, combine or conspire to fix the prices

> that they or any other wholesaler or retailer charge. Rather, the price posting laws mandate unilateral action on the part of every wholesaler . . . .
>
> . . . [W]e find no *per se* violation due to price fixing or restraint of trade; therefore, we cannot constitutionally condemn Missouri's price posting laws as mandating conduct that constitutes a violation in all cases or that places irresistible pressure on private parties to violate the antitrust laws. *Rice*, 458 U.S. at 661, 102 S. Ct. at 3300.

Wine and Spirits Specialty, Inc., 666 S.W.2d at 418-19.

In *Serlin Wine & Spirit Merchants, Inc.* v. *Healy*, 512 F. Supp. 936, 939-42 (D. Conn.), *aff'd sub nom. Morgan* v. *Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981), the district court for the District of Connecticut upheld that state's price posting statute on the ground that the law was facially valid under the Sherman Act and that the law was in any event protected by state action immunity under *Parker* v. *Brown*, 317 U.S. 341 (1943). The Second Circuit affirmed on the grounds stated in the district court opinion. *Morgan*, 664 F.2d at 355.[3]

In *Enrico's, Inc.* v. *Rice*, 551 F. Supp. 511, 513 (N.D. Cal. 1982), *vacated as moot*, 730 F.2d 1250 (9th Cir. 1984), the district court for the Northern District of California held that a distilled spirits price posting scheme was not preempted by the Sherman Act under the analysis set forth in *Rice* v. *Norman Williams Co.*

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[3] The Second Circuit appeared to focus more on the state action immunity issue than the facial conflict issue. *Morgan*, 664 F.2d at 355-56; *see Battipaglia*, 745 F.2d at 172 n. 9.

Finally, the district court in this case, Petition, Appendix B, held that the Oregon price posting and price adherence rules were not a *per se* violation of the Sherman Act and therefore were not subject to preemption under *Rice* v. *Norman Williams Co.* See Petition, Appendix B, App-26-27.[4]

The direct conflict between the decision below and the many other decisions cited herein strongly supports the allowance of a writ of *certiorari* in this case.

B. The decision below involves an important constitutional issue of nationwide significance.

The question whether state price posting laws for alcoholic beverages are preempted by the Sherman Act has nationwide importance. At least 24 states other than Oregon have price posting laws similar in effect to the rules invalidated by the Ninth Circuit in this case. Like Oregon, many of these states have relied upon price posting for decades as a central component of their regulation of the manufacture and sale of alcoholic beverages. The states with price posting laws in effect at the present time are:

1.	Arizona —	Ariz. Rev. Stat. Ann. § 4-251-253 (1977)
2.	California —	Cal. Bus. & Prof. Code §§ 24756, 25000 (West 1985)

[4] The only price posting decision agreeing with the decision below is the decision of the California Court of Appeal for the First District in *Lewis-Westco & Co.* v. *Alcoholic Beverage Control Appeals Board*, 136 Cal. App. 3d 829, 186 Cal. Rptr. 552 (Cal. Ct. App. 1982), *cert. denied*, 464 U.S. 863 (1983).

3.	Connecticut —	Conn. Gen. Stat. § 30-63 (1975)
4.	Delaware —	Del. Code Ann. tit. 4, § 508 (1985)
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9.	Idaho —	Idaho Code § 23-1029 (1977)
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11.	Maine —	Me. Rev. Stat. Ann. tit. 28-A, § 1408 (1987)
12.	Massachusetts —	Mass. Gen. Laws Ann. ch. 138, § 25(c) (West 1981)
13.	Michigan —	Mich. Admin. Code R. 436.1625 (1979)
14.	Missouri —	Mo. Rev. Stat. § 311.332-338 (1963)
15.	Nebraska —	Neb. Rev. Stat. § 53-170.03 (1984)
16.	New Jersey —	N.J. Admin. Code tit. 13, § 2-24.6 (1985)
17.	New Mexico —	N.M. Stat. Ann. § 60-8A-12 (1978)
18.	New York —	N.Y. Alco. Bev. Cont. Law § 55-b; § 101-b (McKinney 1987)

19. Oklahoma —	Alcohol Beverage Law Enforcement Commission Rules, Article 3, § 4 (1986)
20. Pennsylvania —	Pa. Admin. Code § 11.201B (Shepard's 1972)
21. South Dakota —	S.D. Admin. R. 64:75:03:02 (1986)
22. Tennessee —	Tenn. Code Ann. § 57-6-104(a) (1983)
23. Vermont —	Vt. Admin. Comp. (Dept. of Liquor Control) R. # 12 (1985)
24. Washington —	Wash. Admin. Code R. 314-20-100 (1986)

The decision below puts into doubt the validity of every one of these laws. Those states within the Ninth Circuit, such as Washington, Idaho and California, are most directly affected, but every price posting law in the country could ultimately be challenged under the decision below.

The nationwide significance of the issue is further justification for the allowance of a writ of *certiorari* in this case.

C. The decision below is erroneous.

The decision below is irreconcilably in conflict with the rulings of this Court in *Fisher* v. *City of Berkeley*, 475 U.S. 260 (1986); *Rice* v. *Norman Williams Co.*, 458 U.S. 654; *Exxon Corp.* v. *Governor*

of Maryland, 437 U.S. 117 (1978); and *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35 (1966), and will be reversed on appeal to this Court.

In *Fisher*, the Court held that a Berkeley, California ordinance imposing mandatory rent ceilings was not preempted by Section 1 of the Sherman Act because "the rent controls established by Berkeley's ordinance lack the element of concerted action needed before they can be characterized as a *per se* violation of § 1 of the Sherman Act . . . ." 475 U.S. at 270.

The Court found that the ordinance operated unilaterally upon each property owner; there was no agreement among the owners to fix rents, and thus no concerted action. *Id.* The Court also found that the Berkeley rent control ordinance was not a "hybrid" restraint of the type condemned by the Court in *Schweggmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951) and *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). *Fisher*, 475 U.S. at 268-69.

In the decision below, the Ninth Circuit found, as in *Fisher*, that the price posting rules operate unilaterally upon each beer and wine distributor, and that there was no concerted action among the distributors. Petition, Appendix A at App-13. Indeed, the Ninth Circuit relied on *Fisher* to affirm the judgment in favor of the distributors because of the lack of concerted action on their part. Petition, Appendix A at App-13 n. 4.

However, the Court below departed from *Fisher*

and erred in holding that the Oregon price posting regulations "constitute a 'hybrid' restraint in violation of the Sherman Act." Petition, Appendix A at App-13 (footnote omitted). The Court stated that "[t]he regulations constitute a 'hybrid' restraint because . . . Oregon allows private parties to set the prices and does not review the reasonableness of those prices." *Id.*

In so ruling, the Ninth Circuit misunderstood and misapplied the concept of "hybrid" restraint as used by the Court in *Fisher*. The result is a decision which cannot be sustained.

In *Fisher*, the Court drew the concept of a "hybrid" restraint from Justice Stevens' concurrence in *Rice* v. *Norman Williams Co.*, 458 U.S. at 665 (Stevens, J., concurring in the judgment). The *Fisher* Court also drew on Justice Stevens' words to describe a "hybrid" restraint as one involving "a degree of private regulatory power." *Fisher*, 475 U.S. at 268, quoting *Rice* v. *Norman Williams Co.*, 458 U.S. at 666 n. 1.

The Court below was plainly wrong in finding the Oregon price posting rules to be a hybrid restraint in violation of the Sherman Act. A proper application of *Fisher* and *Rice* requires the conclusion that the Oregon price posting rules are not a hybrid restraint preempted by the Sherman Act.

In *Rice*, Justice Stevens distinguished a "hybrid" restraint from "a public regulatory scheme" and "a clearly private restraint." *Rice*, 458 U.S. at 665. He cited *Exxon Corp.*, 437 U.S. 117, and *Joseph E. Sea-*

gram & Sons, Inc., 384 U.S. 385, as examples of "a public regulatory scheme." *Rice*, 458 U.S. at 665. The regulatory schemes in both these cases were very similar in purpose and effect to Oregon's price posting rules.

In *Exxon Corp.*, the Court upheld, against a challenge under the federal antitrust laws, a Maryland statute requiring a producer or refiner of petroleum products to extend "voluntary allowances" uniformly to all service stations it supplies. *Exxon Corp.*, 437 U.S. at 119-120. By limiting the power of a wholesaler to vary the prices at which it sold goods to retailers, the statute prevented whoesalers from offering preferential treatment to some retailers at the expense of others. *Id.*

Joseph E. Seagram & Sons, Inc., 384 U.S. 35, was, in part, a price posting case. A New York statute required alcoholic beverage manufacturers and importers to post their prices to wholesalers and retailers with a state agency on a monthly basis, and to accompany the posting with an affirmation that the posted prices were no higher than the lowest price at which sales for the product had been made anywhere in the United States during the preceding month.[5] *Id.* at 39-40. Under this statute, each product seller unilaterally determined and posted its prices, and product purchasers were free to resell the product at whatever price they wished. The Court upheld the

[5] Oregon does not have a price affirmation statute. Distributors are free to set their posted prices at any level they wish without regard to extraterritorial sales.

statute against a challenge under the antitrust laws, among other grounds. [6]

In both *Exxon Corp.* and *Joseph E. Seagram & Sons, Inc.*, state laws regulated the manner in which private sellers could price their products, but left to each seller the ultimate pricing decision, and left to each buyer unfettered freedom to resell the product at any price. This is what Justice Stevens meant in *Rice* v. *Norman Williams Co.* by "a public regulatory scheme."

The Oregon price posting rules operate in exactly the same way as the statutes in *Exxon Corp.* and *Joseph E. Seagram & Sons, Inc.*, and also constitute a "public regulatory scheme." Under the Oregon system, each distributor determines its own selling price for each product, and each retailer is free to resell the product at any price. The price posting rules regulate the pricing freedom of the distributors only to the very limited extent that each distributor must adhere to its posted prices for a fixed period of time and must offer those prices uniformly to all retailers, without quantity discounts or discounts related to delivery costs.

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[6] Some members of this Court have recently questioned the continuing vitality of *Joseph E. Seagram & Sons, Inc. See Brown-Forman Distillers* v. *New York State Liquor Authority*, 476 U.S. 573, ____ n. 6, 106 S. Ct. 2080, 2087 n. 6 (1986); *Id.*, 476 U.S. at ____ 106 S. Ct. at 2088 (Blackmun, J., concurring). However, the expressed concern has related exclusively to the commerce clause analysis in that case concerning the extraterritorial effect of the price affirmation statute. *Id.* No member of this Court has questioned the antitrust analysis in that decision.

The operation of the Oregon price posting rules is also very similar in effect to the Berkeley rent control ordinance upheld in *Fisher*. The rent control ordinance in *Fisher* set a ceiling on rents. Subject to that ceiling, each property owner was free unilaterally to set any rent he wished. The ultimate price setting decision remained with each property owner, subject to the publicly-imposed constraint. Precisely the same is true under the Oregon price posting rules: the ultimate price setting decision remains with each distributor, subject to the publicly-imposed constraints. Each retailer is free to set its own prices without any constraints.

The Oregon price posting scheme, like the laws of *Fisher*, *Exxon Corp.* and *Joseph E. Seagram & Sons, Inc.*, lacks the element identified by Justice Stevens as essential to a "hybrid" restraint — the element of "private regulatory power." *Rice*, 458 U.S. 665 n. 1 (Stevens, J., concurring in the judgment). The only two examples of "hybrid restraints" cited by the *Fisher* Court were *Schweggmann Bros.*, 341 U.S. 384, and *Midcal Aluminum, Inc.*, 445 U.S. 97. Since *Fisher*, a third example was identified in *324 Liquor Corp.* v. *Duffy*, —— U.S. ——, —— n. 8, 107 S. Ct. 720, 726 n. 8 (1987).

Schweggmann Bros., *Midcal* and *324 Liquor Corp.* all involve the same evil—a state statute implementing resale price maintenance, a *per se* violation of the Sherman Act. The "private regulatory power" created by each of these statutes was the power of a product seller to dictate the price at which the product would be re-

sold — a power forbidden by the Sherman Act. The reason it was a "regulatory" power was that one private party had the right to *regulate* the prices set by another private party.

The Oregon price posting rules do not confer private regulatory power upon any party. No distributor has the power to dictate, control or regulate the prices set by any retailer, or by any other distributor. Nothing in the Oregon price posting rules permits resale price maintenance, and resale price maintenance would be actionable under the Sherman Act if it were to occur in Oregon. Horizontal price fixing is not permitted by the Oregon rules, and would also violate the Sherman Act if it occurred.

The Court below missed this basic point in characterizing the Oregon price posting rules as a "hybrid" restraint because "Oregon allows private parties to set the prices and does not review the reasonableness of those prices." Petition, Appendix A at App-13. In Oregon, each distributor sets its own prices, but no distributor sets prices for any other distributor or for any retailer. There is no "private regulatory power" under the Oregon rules, and they are not a "hybrid" restraint. As in *Fisher*, *Exxon Corp.* and *Joseph E. Seagram & Sons, Inc.*, the Oregon rules are a "public regulatory scheme" which does not conflict with the Sherman Act and is not preempted by that statute.

The decision below resulted in a paradoxical outcome which is fundamentally at odds with the purpose of the Sherman Act. Although the Court found *no* anticompetitive conduct by the distributors, the Court

would nonetheless impose on them a system in which the *state* must determine the "reasonableness" of their prices. Foisting such cumbersome and ill-defined bureaucratic control on the independent price-setting decisions of the distributors could only *reduce* competition, contrary to the basic goal of the Sherman Act.

The judgment for the distributors below will be meaningless if the end result of this lawsuit is to replace the current competitive marketplace with a system of state price supervision. In order to preserve the honest and strong competition which exists in Oregon under the current price posting rules, Coast, along with the other 48 members of the Oregon Beer and Wine Distributors Association, supports the petition for a writ of *certiorari* in this case.

CONCLUSION

The Court should issue a writ of *certiorari* to review the judgment and opinion of the Ninth Circuit Court of Appeals in this case.

Dated this 18th day of December, 1987.

Respectfully submitted,

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No. 87-895

In the Supreme Court
of the United States

OCTOBER TERM, 1987

WILLIAM H. HEDLUND, et al.,

Petitioners,

v.

ELSIE VIOLA MILLER, et al.,

Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit correctly held that regulations of the Oregon Liquor Control Commission which authorize an exchange of price information and result in price stabilization among private parties constitute a per se violation of the antitrust laws?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-895

WILLIAM H. HEDLUND, et al.,
Petitioners,

v.

ELSIE VIOLA MILLER, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents Elsie Viola Miller and Oretta Bernice Lancaster, dba the Junction Cafe and Tavern; Taylor's Coffee Shop, Inc., dba Rennie's Landing; WIAN, Inc., dba Barney's Cable,[1] individually and as representatives of others similarly situated ("respondents"), submit this brief in opposition to the Petition for Writ of Certiorari to the Ninth Circuit Court of

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[1]Named corporate respondents have no parent, subsidiary, or affiliate corporations.

Appeals of the Administrator and Commissioners of the Oregon Liquor Control Commission of the State of Oregon ("petitioners" or "OLCC"), and the brief in support of the Petition submitted by Coast Distributors, Inc. ("Coast"), one of the named private defendants below.

STATEMENT OF THE CASE

Respondents agree generally with petitioners' statement of the history of this very old, much-reviewed case.[2] They supplement petitioners' statement of the case in order to place the opinion below in better perspective.

The decision at issue, Petition, Appendix A, is not the product of an abstract, disembodied challenge to certain regulations of the OLCC. Or. Admin.

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[2]Respondents take no exception to petitioners' list of the parties to the proceeding below; citations to the opinions and judgments below; statement of the grounds for invoking this Court's jurisdiction; and selection of the constitutional, statutory, and regulatory provisions involved in this case.

R. 845-06-090 & 845-10-210 (the "challenged regulations"). It rests on an extensive evidentiary record which demonstrates that the challenged regulations contemplate, authorize, and put irresistible pressure on Oregon's beer and wine wholesalers to engage in a price exchange and price stabilization scheme. The Ninth Circuit properly concluded that this arrangement is in irreconcilable conflict with federal antitrust law, and that it is not shielded by the state action doctrine of Parker v. Brown, 317 U.S. 341 (1943).

This is no abstract decision. It is instead a narrow, fact-specific ruling which reaches only the peculiar hybrid price stabilization arrangement that subsists between the OLCC and its licensee beer and wine wholesalers. The decision does not reach any other state's liquor regulations.

1. Factual Foundation of the Decision Below

Between 1978, when respondents first filed their claims in the United States District Court for the District of Oregon, and 1984, when this case was submitted for decision to the Ninth Circuit, respondents conducted extensive discovery in both the public and private sectors. The result is a vast body of evidence, the essential points of which are not contested. The evidence detailed for the appeals court the concrete ways in which the challenged regulations contemplate and sustain a price stabilization scheme for wholesale beer and wine prices in Oregon.

Respondents presented to the Ninth Circuit the testimony of OLCC policy-makers and senior OLCC administrative, information, and enforcement officers; testimony of licensed beer and wine wholesalers; a petition by the Oregon Attorney General to amend the challenged

regulations; reports of the Oregon Department of Justice and the Oregon Attorney General; the staff Sunset Review report; a management study of the OLCC; and extensive additional evidence.

This evidence provides the basis for the Ninth Circuit's fact-specific conclusion that the challenged regulations mandate a price exchange and price stabilization scheme among beer and wine wholesalers, in per se conflict with federal antitrust law. The same evidence establishes that the State of Oregon does not actively supervise the price restraint imposed by the challenged regulations.

The challenged regulations on their face require beer and wine wholesalers to engage in the following conduct as a condition of their license:

1. Publicly post (and thereby publish and exchange) present and future prices, and commit to selling at only the posted price;

2. Observe significant, artificial restrictions on price reductions; and

3. Agree to post, exchange, and charge only readily-comparable delivered prices.

Or. Admin. R. 845-06-090, 845-10-210.

The evidence on which the Ninth Circuit's decision rests delves beneath the regulations' bland surface. Testimony from both the public and private sectors establishes that in practice, the challenged regulations mandate a price exchange and stabilization scheme whose operation and enforcement depend on the conduct of individual, competing wholesalers. Specifically, it is not disputed that:

- All licensees set their wholesale beer and wine prices observing the constraints of the challenged regulations.

- All licensed wholesalers providing testimony below utilize the price exchange features of the challenged regulations to review their competitors' pricing when they "individually" set their own prices.
- The OLCC acknowledges that no wholesaler would independently adopt these pricing restrictions without knowledge that all other competing licensees would do likewise.

The evidence further establishes that the OLCC, for its part:

- Devotes significant resources to facilitating the public exchange features of the price postings;
- Recognizes that wholesale licensees regularly and consistently utilize the OLCC's facilities to review competitors' current and future prices;
- Relies on the private wholesalers' use of the challenged regulations' price

exchange feature to police a critical price restraint -- selling at only the publicly exchanged price.

Petitioners and the private defendants below did not contest respondents' evidence that the challenged regulations' price exchange mechanism results in the stabilization and artificial inflation of wholesale beer and wine prices in Oregon.

Throughout this protracted litigation in the federal and state courts, the OLCC said it did not know what provisions of its enabling legislation (the Oregon Liquor Control Act ("OLCA"), Or. Rev. Stat. §§ 471.005, et seq.) the challenged regulations were intended to further or achieve.[3]

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[3]In Miller v. Oregon Liquor Control Comm'n, 42 Or. App. 555, 560, 600 P.2d 954, 957 (1979), rev. denied, 288 Or. 493 (1980), the Oregon Court of Appeals concluded that the OLCC was not required to consider the anticompetitive effect or purpose of regulations which it adopts pursuant to the OLCA. The court refused to consider whether the challenged regulations conflict with federal antitrust policy.

In fact, the evidence was unanimous that the purpose and effect of the challenged regulations contravenes federal antitrust law. In its memorandum in opposition to plaintiffs' motion for summary judgment, the OLCC itself admitted that the regulations limit wholesale beer and wine "price fluctuations" and competition via "short term price changes." The only justification which the Oregon Beer and Wine Distributors' Association offered below in support of the regulations was that price posting was needed "to maintain stability in the market." See also App. 15, 16.

Most tellingly, both the legislative and executive branches of the State of Oregon have repeatedly criticized these regulations for their improper, anticompetitive purpose and effect.

The Attorney General of Oregon petitioned the OLCC in 1976 to amend its price posting and quantity discount

regulations in order to eliminate their anticompetitive effect. As part of this proceeding, the Oregon Department of Justice carefully analyzed the authority, purpose, and effect of the OLCC's rules. App. 1-12. It concluded that the OLCC's price posting rule lacks any legislative authority, and that it mandates a violation of federal antitrust law:

> The existing price posting rule is designed to give wholesalers a 10 day period in which to react to their competitors' publicly announced pricing intentions. As a practical matter this permits a wholesaler to announce a price change and then retreat if his competitors do not follow suit. By this means wholesalers can "agree" on future prices without meeting or discussing prices.

App. 5. The Oregon Attorney General and Department of Justice recommended that the OLCC substitute price reporting for price posting and allow uniform, cost-based quantity discounts, such as are permitted under federal law. See App. 10.

Two years after its petition, the Oregon Attorney General completed an extensive investigation of the OLCC. He concluded that the OLCC lacked statutory authority to control wholesale wine and beer prices, and that there was no public health or safety justification for the challenged regulations. App. 12-16. The report continued:

> [N]evertheless the agency has adopted a number of rules designed purposely to raise and stabilize wholesale wine and beer prices.

App. 12. The Attorney General pointed to the advance price posting and post-off rules and the prohibition of quantity discounts as the OLCC's primary price stabilizing devices.

The Attorney General identified the moving force sustaining these rules as wholesalers who have profited from this shelter from a free marketplace:

> But a closer look reveals that the pressure to retain these rules comes not from people

> concerned with public health and safety, but from established businessmen concerned with profits who want "stabilized" prices and protection from "price wars." There is clearly a cost to the consumer and a benefit to the sellers of this reduced price competition.

App. 16.

During the same period, the Legislative Research office conducted an extensive, nonpartisan investigation into the OLCC for the Legislative Assembly pursuant to Oregon's "sunset" law. Or. Rev. Stat. Ch. 842. App. 17-20. The report recommended a thorough reordering of the OLCC's structure and policies, including the elimination of its anticompetitive rules. In particular, the Legislative Research report concluded:

> Certain laws and regulations [of the OLCC] impede competition beyond a level necessary for control of the industry and protection of the public health, safety, and welfare. This restriction of competition is accomplished in three ways: (1) the state liquor monopoly, (2) anticompetitive licensing

> criteria, and (3) price posting rules.

App. 18. It, too, recommended the repeal of the challenged regulations. App. 20.

2. The Ninth Circuit's Decision

The foregoing is only a sampling of the extensive factual background which the Ninth Circuit had before it. In ruling on respondents' motion for summary judgment, the Ninth Circuit found that there was no genuine issue of material fact. The challenged regulations do contemplate the exchange of price information by private sellers, and they require adherence to the announced prices and terms of sale. This arrangement is a per se violation of the Sherman Act.[4] 15 U.S.C. § 1. Petition, App. 7-9, 16, relying on Sugar Institute v. United States, 297 U.S. 553 (1936); and

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[4]The disingenuous assertion of Coast that the challenged regulations are needed "to preserve the honest and strong competition which exists in Oregon," Coast Brief, p. 16, flies in the face of these facts.

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) (per curiam).

Having found that the challenged regulations mandate a result which is per se unlawful under federal antitrust law, the Ninth Circuit then turned to the argument made by petitioners and the private defendants below that there is no evidence of an agreement or concerted activity among the individual beer and wine wholesalers. The court emphasized the real-world operation of the OLCC regulations:

> [I]t cannot be ignored that the challenged regulations facilitate the exchange of price information and require adherence to the publicly posted prices. In other words, the state compels activity that would otherwise be a per se violation of the Sherman Act.

Petition, App. 10.

Relying on this Court's precedents, the Ninth Circuit held that, on these facts, a separate showing of concerted activity by the wholesalers was not

required in order to find that the regulations are preempted. Petition, App. 10-13, following Fisher v. City of Berkeley, 475 U.S. 260 (1986); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); and California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) ("Midcal"). The court held first that, as in Schwegmann, "[t]he mere fact that each wholesaler complies unilaterally with the regulations does not save an impermissible pricing scheme from an antitrust challenge." Petition, App. 13. Alternatively, the Ninth Circuit characterized the challenged regulations as a "hybrid" restraint, rather than a unilateral one, under which the OLCC allows the wholesalers to set, exchange, and stabilize their prices without reviewing the reasonableness of those prices. Id.

The Ninth Circuit rejected petitioners' claim that even though the challenged regulations effect a per se

violation of federal antitrust law, they are immunized from preemption under the state action doctrine. Petition, App. 14-15. While the court left open the question of whether it was technically bound by the law of the case doctrine, it found no reason to depart from its earlier holding in this same case. It noted that "[t]here have been no material changes in Oregon's regulations scheme since Miller II."[5] Petition, App. 14-15. See Miller v. Oregon Liquor Control Comm'n, 688 F.2d 1223, 1226-27 (9th Cir. 1982). In this earlier proceeding, the Ninth Circuit held that the regulations fail the second prong of the test set out in Midcal, 445 U.S. at 105, because Oregon does not actively supervise the resulting pricing restraint. Petition, App. 14-15.

The essential evidence is uncontested

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[5]Thus the decision that the challenged regulations are not immune from preemption under Parker v. Brown is no longer available for review. 28 U.S.C. § 2101(c).

that Oregon does not actively supervise the restraint. The OLCC does not establish the wholesalers' prices. It does not conduct investigations or hearings or otherwise review the reasonableness of these prices. It has never monitored market conditions or investigated the effect of its regulations on wholesalers' prices or pricing practices. It has never investigated the alleged market conditions to which it claims the regulations are addressed.[6]

The Ninth Circuit found no need to reach the first prong of Midcal, and it remanded the twenty-first amendment issue.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision depends upon unique facts which were demonstrated in an extensive record below. This record

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[6]Petitioners' argument that the challenged regulations are necessary to prevent beer and wine distributors from offering preferential prices to certain customers, Petition, p. 11, lacks any merit. Oregon has an express anti-price discrimination law. Or. Rev. Stat. §§ 646.010-646.180.

establishes that the OLCC's scheme contemplates that individual, private wholesalers will use the public posting mechanism and attendant rules to exchange and stabilize prices. On these facts, the court below correctly applied this Court's precedents to conclude that the challenged regulations create a hybrid restraint on competition, in per se conflict with federal antitrust law.

The decision below is not one of broad or abstract applicability, so it casts no shadow on other states' regulatory structures. Furthermore, it does not conflict with any case that was decided after Fisher v. City of Berkeley.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. The Decision Below Rests on Its Particular Facts, Which Establish that the Challenged Regulations Compel Conduct that is a Per Se Violation of Federal Antitrust Law.

The court below reviewed the extensive evidentiary record de novo. Petition,

App. 7. It found that the challenged regulations operate in situ to compel and enable conduct among the wholesalers which under all circumstances is in irreconcilable conflict with federal antitrust law. Petition, App. 8-10. The court below did not rule in the abstract on the anticompetitive effect of a generic price-posting regulation. Instead, it examined evidence of the concrete conduct which the challenged regulations contemplate and foster.

The Ninth Circuit correctly found no genuine issue concerning the fact that under the challenged regulations' mandate, all wholesale competitors engage in the following conduct: they post, and thereby publish and exchange, their present and future prices; they sell only at the exchanged price; they post, exchange, and charge only delivered prices to facilitate ready comparison; and they "individually" set prices within this pricing scheme.

This scheme is identical to the conduct which this Court found to be a per se violation of § 1 of the Sherman Act in Sugar Institute v. United States, supra, 297 U.S. 553.[7] The only difference between the conduct in the present case and that in Sugar Institute (a case significantly absent from petitioners' and Coast's discussions), is the presence of facilitating state regulations.

2. The Ninth Circuit Correctly Applied This Court's Precedents.

Under the rule established in Rice v. Norman Williams Co., a state regulation will be condemned under § 1 of the Sherman Act "when the conduct contemplated by the statute is in all cases a per se violation." 458 U.S. 654, 661 (1982). The record in this case establishes that the conduct contemplated by the challenged

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[7]The challenged regulations, in addition, impose arbitrary penalties on price reductions and thereby further discourage price competition and stabilize prices at upward levels.

regulations amounts to a price exchange and price stabilization scheme among competitors. As a matter of law, this scheme is per se unlawful. Sugar Institute v. United States, supra, 297 U.S. 553; Catalano, Inc. v. Target Sales, Inc., supra, 446 U.S. 643.

A. On the Present Facts, the Challenged Regulations Mandate a Hybrid Restraint on Competition.

The court below held, in the light of the actual demonstrated conduct, that the challenged regulations mandate a hybrid restraint on trade. Petition, App. 10-13. Petitioners argue instead that the regulations are a purely unilateral, public restraint which is not reached by § 1 of the Sherman Act. Petitioners would have the Court turn a blind eye to the concrete facts of this case: The challenged regulations "compel activity" by private parties "that would constitute a per se violation of the Sherman Act." Petition, App. 16.

The Court recently restated the test for distinguishing between public and hybrid restraints on competition:

> Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of § 1. Certain restraints may be characterized as "hybrid," in that nonmarket mechanisms merely enforce private marketing decisions. See Rice v. Norman Williams Co., 458 U.S., at 665 (STEVENS, J., concurring in the judgment). Where private actors are thus granted "a degree of private regulatory power," id., at 666, n. 1, the regulatory scheme may be attacked under § 1.

Fisher v. City of Berkeley, 475 U.S. at 267-68 (emphasis added).

In Fisher, the court held that Berkeley's rent control ordinance was a public restraint because it completely removed price-setting power from private landlords and gave it to the Rent Stabilization Board. 475 U.S. at 269. It contrasted Berkeley's public restraint with the hybrid restraints found in Schwegmann and Midcal. In those cases, the Court

analyzed as hybrid restraints Louisiana's and California's statutory schemes under which the states enforced minimum resale prices set by individual liquor and wine wholesalers. Id. at 268-69. In the present case, the Ninth Circuit correctly characterized the challenged regulations as a hybrid restraint because they empower individual wholesalers to set, exchange, stabilize, and police their prices.

The actual facts in the present case present a core example of a hybrid restraint. As the court below correctly held, the challenged regulatory scheme does not contemplate unilateral action by the OLCC. Instead, it "allows private parties to set the prices and [the state] does not review the reasonableness of those prices." Petition, App. 13. The wholesalers retain the private regulatory power to preview their competitor's prices, adjust their own accordingly, and police the regulations' price adherence term. The result is a

classic hybrid restraint, in violation of § 1.

The test articulated in Fisher is entirely adequate in the present, fact-specific case to distinguish between hybrid and public restraints. This case presents no profitable occasion for the Court to expend its resources to give "guidance" to Oregon or other states concerning the characterization of "hybrid" restraints, as petitioners urge.[8] The Ninth Circuit and the Oregon Department of Justice examined the actual operation of the challenged regulations and reached the correct conclusion: the challenged regulations

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[8]Petitioners' argument that Oregon needs more guidance in order to "avoid resource-draining 'hybrid' regulatory schemes," Petition, pp. 9-10, is of no force. A purely public restraint on competition through unilateral action by a state governmental unit, e.g., setting prices, may entail significant expenditures of administrative time and money. See, e.g., Fisher v. City of Berkeley, supra, 475 U.S. at 262 (Rent Stabilization Board must set rents for approximately 23,000 units, adjust them annually, and determine individual petitions for adjustment).

mandate conduct that is in per se conflict with federal antitrust law.

B. Having Found that the Challenged Regulations Impose a Hybrid Restraint, the Ninth Circuit Correctly Concluded that Separate Concerted Activity Among the Wholesalers Need Not be Shown to Establish that the Regulations are Preempted.

Relying on Fisher v. City of Berkeley, the Ninth Circuit correctly held that once a restraint is identified as "hybrid," "the regulatory scheme itself may be attacked under § 1" without a separate showing of concerted activity by private parties. Petition, App. 13; 475 U.S. at 268-69.

Petitioners argue that the challenged regulations cannot be preempted because no separate agreement or concerted activity was shown among the wholesalers. This is simplistic, as the Ninth Circuit noted. Petition, App. 10. The Sherman Act preempts state laws which irreconcilably conflict with it, even if there is no separate "contract, combination, or

conspiracy" among the individual private regulatees. 324 Liquor Corp. v. Duffy, ___ U.S. ___, 107 S. Ct. 720 (1987); Midcal, supra, 445 U.S. 97; Schwegmann, supra, 341 U.S. 384; See also Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) (city ordinance preempted, no agreement or conspiracy shown between city and plaintiff's competitor); Garland, Antitrust and State Action: Economic Efficiency and the Political Process, 96 Yale L.J. 486, 502-07 (1987).

All parties agree that § 1 does not reach unilateral action by a state or an individual. But it does preempt hybrid combinations in which private parties are "granted 'a degree of regulatory power'" and regulatory mechanisms "merely enforce private marketing decisions." Fisher v. City of Berkeley, supra, 475 U.S. at 268. The facts below establish that the challenged regulations merely enforce the wholesalers' price exchange and

stabilization scheme. The Ninth Circuit correctly applied the rule of Fisher to hold that federal law preempts them.

3. There Is No Conflict With Any Decision After Fisher.

The decision below speaks to the unique factual situation created in Oregon by the challenged regulations. It rests on the line of cases, ending with Fisher, striking down hybrid restraints. The Ninth Circuit's decision does not conflict with any post-Fisher decision. Other courts' pre-Fisher rulings, which concern other states' liquor laws, do not create a genuine conflict.

The cases which petitioners and Coast urge as conflicting directly with the decision below do not. They must be distinguished on two primary grounds. First, these cases were all decided before Fisher v. City of Berkeley. They do not use the analysis of hybrid restraints which was available to the Ninth Circuit. They

incorrectly confine Midcal to its facts as a resale price maintenance case, and rely instead on Rice v. Norman Williams Co. Second, these cases concern abstract challenges to other states' price-posting laws. None of these cases presents a concrete situation in which regulations were found to contemplate the exchange and stabilization of prices by private parties.

In Battipaglia v. New York State Liquor Authority, 745 F.2d 166 (2d Cir. 1984), cert. denied, 470 U.S. 1027 (1985), the Second Circuit, in a split decision, upheld an abstract, facial attack upon a New York statute which requires liquor wholesalers to post prices and sell at those prices for 30 days. The statute does not single out price decreases for the imposition of penalty holding periods or require quotation of only delivered prices. Quantity discounts, though restricted, are not banned. No evidence was presented of the statute's actual effect on price

competition or whether the liquor authority relied upon private wholesalers to police their competitors' pricing conduct.

The majority made clear that its decision was predicated exclusively upon the theoretical ground that a price exchange statute, without more, is not per se unlawful. It expressly "le[ft] open the possibility of a challenge based upon its actual operation."[9] 745 F.2d at 175.

The majority in Battipaglia distinguished Midcal as a resale price maintenance case. It declined to decide whether a separate agreement had to be shown among the wholesalers to sustain a

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[9]The majority implicitly distinguished its holding from Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Board, 136 Cal. App. 3d 829, 186 Cal. Rptr. 552, 557 (1982), cert. denied, 1464 U.S. 863 (1983) (holding that California's price posting statute was preempted by § 1), on the ground that "the record show[ed] price posting to have had an anti-competitive effect." 745 F.2d at 172 (footnote omitted).

§ 1 violation. 745 F.2d at 173. It recognized:

> [T]here is some force in the argument that a statute compelling conduct which, in its absence, would permit the inference of an agreement under § 1 is inconsistent with that section unless saved by Parker v. Brown.

Id. The Court affirmed this line of reasoning in Fisher.

Judge Winter, writing in dissent in Battipaglia, anticipated Fisher when he noted that the case should not be determined by Rice v. Norman Williams Co. but by Midcal, which is not confined simply to resale price maintenance.[10] 745 F.2d at 179.

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[10] See also Admiral Wine & Liquor Co. v. State Liquor Authority, 89 A.D.2d 522, 452 N.Y.S.2d 213, 214 (1982) (price posting statute preempted under Midcal), rev'd, 61 N.Y.2d 858, 462 N.E.2d 146 (1984); Wine & Spirits Specialty, Inc. v. Daniel, 666 S.W.2d 416, 422-24 (Mo.) (Blackman, J., dissenting) (same), app. dismissed, 469 U.S. 802 (1984); Intercontinental Packaging Co. v. Novak, 348 N.W.2d 330, 334 (Minn. 1984) (trial court relied on Midcal to hold that statute is preempted).

> The relevant issue under the supremacy clause has to do with the degree to which a state may bring about the very anti-competitive arrangements the Sherman Act was designed to avoid . . . . [T]he fact that the state compels a private cartel offers no reason to exempt the legislation from scrutiny under the supremacy clause.

Id.

The additional decisions cited by petitioners and Coast upholding other states' price-posting laws share the same limits as Battipaglia. They were all decided before Fisher. They all concern different statutory schemes. None of these cases tests the statutes in question as hybrid restraints.

In Admiral Wine & Liquor Co. v. State Liquor Authority, the court on appeal did not consider Schwegmann, improperly distinguished Midcal as a resale price maintenance case, and, like Battipaglia, relied instead on Rice v. Norman Williams Co.. 61 N.Y.2d 858, 462 N.E.2d 146, 147 (1984). The same is true of Enrico's, Inc.

v. Rice, 551 F. Supp. 511, 515 (N.D. Cal. 1982), vacated as moot, 730 F.2d 1250 (9th Cir. 1984); Serlin Wine & Spirit Merchants, Inc. v. Healy, 512 F. Supp. 936 (D. Conn.), aff'd sub nom. Morgan v. Division of Liquor Control, 664 F.2d 353, 355 (2d Cir. 1981); Wine & Spirits Specialty, Inc. v. Daniel, 666 S.W.2d 416, 418 (Mo.) (en banc), app. dismissed, 469 U.S. 802 (1984); and Intercontinental Packaging Co. v. Novak, 348 N.W.2d 330, 334-35 (Minn. 1984).[11]

Judge Winter's analysis in his dissent in Battipaglia is consistent with Fisher, and applies with equal force to the present case:

> The arrangement in question thus would be per se illegal if

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[11]The alleged conflict between the Ninth Circuit and these decisions is moot in a majority of cases because the courts found that the statutes at issue are saved by Parker v. Brown. Battipaglia v. New York State Liquor Authority, 583 F. Supp. 8, 10 (S.D.N.Y. 1982), aff'd on other grounds, 745 F.2d 166 (2d Cir. 1984); Serlin, supra, 512 F. Supp. at 940, aff'd, 664 F.2d at 356; Intercontinental Packaging Co., supra, 348 N.W.2d at 335.

> accomplished solely through private agreement, and our decision, therefore, is governed by Midcal rather than by Rice v. Norman Williams Co., 458 U.S. 654, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982). Indeed, to hold otherwise is to forbid states from authorizing resale price maintenance, the anticompetitive effect of which is the subject of great controversy, . . . but to allow them to authorize horizontal price fixing, about which all agree.

745 F.2d at 179 (citation omitted).

CONCLUSION

The Ninth Circuit, following the established precedents of this Court, correctly determined (1) the OLCC's regulations mandate a hybrid price exchange and stabilization scheme in per se conflict with of § 1 of the Sherman Act, and (2) the regulations are not immunized by the state action doctrine. The courts do not need additional guidance on these issues. The decision below does not conflict with any opinion that relies on Midcal or post-dates Fisher.

For all the reasons stated above, the Court should deny the petition for a writ of certiorari or, alternatively, summarily affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

EXCERPT OF MEMORANDUM
OF THE ATTORNEY GENERAL OF OREGON

BEFORE THE OREGON LIQUOR CONTROL COMMISSION

In the Matter of the Amendment of Rules 10-080, 10-105 and 10-210, regarding minimum beer and wine prices and sales below cost.	)))))))	MEMORANDUM

This memorandum deals with price-fixing, a name for any number of mechanisms which operate to deprive independent businessmen of the opportunity or motive to compete in an open market. Free and open competition provides a continuous incentive to improvement and innovation, and society's resources are directed toward and reward those enterprises which offer the highest quality and the most efficient means of production and distribution. Price-fixing results in a lessening of competitive drive and introduces inefficiency. At its worst it discourages innovation and subsidizes poor products,

bad service and incompetent businessmen, who would not survive if forced to depend on business they could generate in a competitive marketplace.

Price-fixing cheats the consumer, and this simple economic fact has been recognized in federal law since 1890, 15 U.S.C. §1, et seq., the Sherman Act. Oregon Laws 1975, ch 255, enacted in 1975 is almost identical to the 85-year old Sherman Act. It declares a basic policy of free and open price competition by prohibiting all combinations in restraint of trade.

This law (and the Sherman Act) require very careful scrutiny of price regulation by state agencies. Only where there is a very clear mandate from the legislature will agency price-fixing withstand an antitrust challenge.

Through its administrative rules the OLCC currently fixes minimum wholesale

prices for beer and wine. The rule prohibits wholesale and retail sales of malt beverages and wine below "cost" and quantity discounts are prohibited at the wholesale level. Price posting in advance of price changes is required of wholesalers. The Petition sets forth proposed amendments to the rules designed principally to do three things:

(1) Abandon Commission regulation of wholesale and retail prices.

(2) Limit information exchange between wholesalers to the minimum necessary to accomplish the Commission's statutory responsibilities.

(3) Permit cost justified quantity discounts by wholesalers.

MINIMUM PRICES AND SALES BELOW COST

This memorandum concludes that the OLCC has no authority to fix or otherwise stabilize wholesale or retail beer or wine prices.

* * *

ORS 471.705 et seq. provide the regulatory authority of the OLCC. The Commission is specifically empowered to fix prices of alcoholic liquor containing over 4% purchased from the Commission, but is granted no express authority to fix the prices of beer and wine sold by others. The statutory language in this chapter is broad. But the legislature has not authorized price control, a regulatory tool well known to the legislature and expressly authorized for other commodities and services.

* * *

In any event, in 1975 the legislature repealed ORS 646.100 and enacted the state Antitrust Law. in doing so, the legislature declared a general policy of open price competition. With no direct authorization for the Commission to set minimum prices, there is no reason to believe the legislature intended beer and

wine sellers to be protected from ordinary market forces or that wholesalers or retailers were to be deprived of the right to independently make nondiscriminatory pricing decisions. On the contrary, the state's Antitrust Act recognizes the benefits of free and open price competition and establishes the law of the state in that regard. [Footnote omitted.]

INFORMATION EXCHANGE

The existing price posting rule is designed to give wholesalers a 10 day period in which to react to their competitors' publicly announced pricing intentions. As a practical matter this permits a wholesaler to announce a price change and then retreat if his competitors do not follow suit. By this means wholesalers can "agree" on future prices without meeting or discussing prices. If such information were exchanged privately by competitors and any stabilizing effect

on prices resulted, there would be a clear violation of the Sherman Act of the Oregon Antitrust Act. U.S. v. Container Corp. of America, 393 U.S. 333 (1939).

Without legislative authority for causing a price stabilizing exchange of information, the Commission stands in the same position as it does on direct price control. However, the Commission does have arguable need to receive price information so that it can enforce ORS 471.465 and 470, which prohibit retailer financial assistance in a variety of forms. The Petitioner's proposed rule would meet this need without requiring wholesalers to announce in advance their pricing intentions. Price changes would be reported after they took place for each month in which a change occurred. To the extent that the reported prices suggested a violation of statute or rule, the Commission would be in a position to make a

prompt investigation. But, by requiring reporting after the fact, some degree of normal price competition could be left in the market. Price reporting is a reasonable substitute for price posting which can serve the Commission's purposes without unduly interfering with normal competitive pricing strategy.

QUANTITY DISCOUNTS

Rule 210 currently prohibits quantity discounts and requires that "All price postings shall be consistent as between the various packages and containers offered for sale." Quantity discounts and varying prices among container sizes and types are legitimate pricing policies practiced almost universally in our economy. They often reflect very real cost differences involved in handling, ordering and billing by wholesalers. Obviously it costs a wholesaler less to deliver 50 cases to one customer than to deliver 5 cases to 10

customers. He has a legitimate cost reason to offer his customers a quantity discount, or to separately state handling and delivery charges on a per order basis.

If this legitimate reflection of cost differences is prohibited by the Commission the result is an artificial surcharge against the volume customer. Moreover, customers have no incentive to order in quantity and thereby permit the wholesaler to improve his productivity.

Economics aside, however, the Commission has no statutory authority to interfere with wholesalers' independent pricing decisions. The commission may enforce ORS 471.465 which prohibits "gratuities or rebates". But a cost justified quantity discount is neither. Obviously, if a difference in price is cost based it is not a gratuity. It is no gratuity to receive a 6 pack for $1.59 from

a seller who charges $.30 for single bottles.

* * *

The overall intent of ORS 471.465, is consistent with the conclusion that uniform quantity discounts are not prohibited. ORS 471 takes a number of precautions to insure that retailers remain independent from their suppliers, including prohibiting suppliers from rendering gifts, rebates, financing or more than nominal services to retailers. Personal ties are discouraged as well. ORS 471.457 and 463. The legislature was obviously intent on prohibiting any form of financial assistance by suppliers from influencing the business decisions of retailers. Federal law is similar in outlawing the so-called "tied house", by prohibiting, among other things, "furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs,

supplies, money services or other things of value." (with certain exceptions). 27 USC §205 (b). But neither statute is aimed at restricting legitimate, uniform, cost based pricing decisions. Neither statute was designed to subsidize small purchasers. And the federal law has been so interpreted by the Bureau of Alcohol Tax and Firearms. ATF Ruling 75-12 states in part:

> ". . . discounts may be granted to introduce new products, close out discontinued lines, and pass on to retailers savings to the supplier as a result of volume purchases, etc., and as such are methods used to arrive at an agreed sales price. However, if the discount is such that it is in reality a subterfuge for granting financial assistance to a retailer or for any other proscribed purpose, the discount would constitute a 'gift' within the meaning of 27 U.S.C. 205(b)(3).
>
> "It is not the intent of the Bureau to interfere with industry members' prerogative to use discounts, rebates, etc., as legitimate pricing arrangements."

The Bureau will investigate a pricing arrangement further if it appears that it does not meet certain cost criteria; but clearly cost based quantity discounts are not prohibited.

The Petitioner's proposed rule would permit uniform cost based quantity discounts as federal law now permits.

* * *

In conclusion, Petitioner urges the Commission to undertake a rulemaking proceeding and to adopt the foregoing proposed amendments. Petitioner desires the opportunity to express his views with respect to any and all proposed amendments advanced by other persons on this subject matter, and to be notified of all actions

taken by the Commission with respect to the attached petition.

Respectfully submitted

LEE JOHNSON
Attorney General

[signature]
Alvin Alexanderson
Assistant Attorney General
Of Attorneys for Petitioner

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EXCERPT OF OREGON ATTORNEY GENERAL'S REPORT
MARCH 2, 1978

* * *

Stabilization of Beer and Wine Prices[1]

The OLCC has no statutory control over prices of beer and wine (with one minor exception discussed below). Nevertheless the agency has adopted a number of rules designed purposely to raise and stabilize wholesale beer and wine prices. The so-called "price posting" rules require beer and wine wholesalers to post their

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[1]Footnotes omitted.

prices publicly with the Commission and to post any changes 10 days in advance. This gives wholesalers ready access to all their competitor's [sic] current and even future prices, information which most businessmen consider highly confidential. Such exchanges of information have long been held to constitute illegal price fixing because of the stabilizing effect they have on the market. U.S. v. Container Corp. of America, 393 U.S. 333 (1969).

In 1976 the Attorney General requested the OLCC to repeal several of its price stabilizing rules including the advance posting requirement. The request was granted in part and denied in part. In opposition to that request the Oregon Beer and Wine Distributors Association made its position and the real effect of the rule clear in a letter to the Commission.

> "The association maintains that a prior approval to price posting (changes in price) should

> be required for the control factor to maintain stability in the market."

The second most important price stabilizing device used by the OLCC is its 180 day "post off" rule, OAR 845-10-210(1)(d), (2)(d). This rule prohibits beer and wine wholesalers from reducing their prices unless they keep the lower price in effect for 180 days (30 days for wine and there is an exception for industry-wide cost increases). This prohibits manufacturers from offering short term promotional discounts designed to introduce customers to a product they wouldn't try without a price concession. And it makes it very risky for a wholesaler to experiment with lowering prices, as he may be stuck with a low price which doesn't pay for itself in increased sales. The OLCC has no statutory authority to inhibit price reductions, and no public health or safety justification for doing so.

Another OLCC rule designed to limit price competition is OAR 845-10-210 (1)(a) and (2)(a). This rule prohibits quantity discounts, and again the Commission has no statutory authority to do so. The Attorney General proposed eliminating this rule in 1976, but it was retained. A letter from the industry at the time explained its purpose and effect. Permitting quantity discounts according to the Oregon Independent Retail Grocers Association ". . . would lead to retail price wars on beer and wines, which would, in [its] opinion, destroy the purpose of the Oregon Liquor Control Rules and Regulations."

* * *

6. OAR 845-10-211 establishes a delivered price system from wholesaler to retailer. This permits a retailer to pick up beer and wine in his own vehicles, but not to achieve any cost saving for doing so. Delivered prices are a common price

stabilizing mechanism. Preventing separately stated delivery charges simplifies price comparison and often results in economic waste as neither wholesaler nor retailer has any incentive to minimize delivery distances.

* * *

Through all of these rules and statutes the OLCC restricts competition among businessmen in this industry. Arguments can be advanced that these anticompetitive policies result in health safety or moral benefits to society. But a closer look reveals that the pressure to maintain these rules comes not from people concerned with public health and safety, but from established businessmen concerned with profits who want "stabilized" prices and protection from "price wars." There is clearly a cost to the consumer and a benefit to the sellers of this reduced price competition.

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EXCERPT OF STAFF SUNSET REVIEW
OREGON LIQUOR CONTROL COMMISSION
PREPARED PURSUANT TO CHAPTER 842
OREGON LAWS 1977
LEGISLATIVE RESEARCH, AUGUST 1978

* * *

Background. The Oregon Liquor Control Commission (OLCC) was established in 1933, following repeal of prohibition.

* * *

During the past decade, the OLCC has been the subject of numerous studies and investigations. While this review was being conducted, the agency was also under scrutiny by the state Attorney General; Executive Department, Personnel Division; a Governor's special commission; the City Club of Portland; and the media.

* * *

Primary Recommendation

Legislative Research recommends that the existing statute be allowed to expire and be replaced by a law modifying the

structure, authority, and role of the commission in regulating the liquor industry.

* * *

Certain laws and regulations impede competition beyond a level necessary for control of the industry and protection of the public health, safety, and welfare. This restriction of competition is accomplished in three ways: (1) the state liquor monopoly, (2) anti-competitive licensing criteria, and (3) price posting rules.

* * *

In order to achieve a level of regulation which will provide adequate control without unnecessary interference with private enterprise and competition, this report contains specific recommendations regarding:

(1) elimination of the state's monopoly on retail distilled liquor sales and creation of a

licensed private enterprise system of liquor outlets,

(2) retention, at least temporarily, of the state monopoly on wholesale sales of distilled liquor,

(3) elimination of the quota on dispenser licenses, and

(4) elimination of anti-competitive statutes and rules.

Because of the extent of change needed, we recommend a major revision of the statutes.

* * *

Price posting. Under OAR 845-10-210(1), wholesalers of malt beverages and wine must post their prices with the commission and notify it of price changes 10 days in advance. If the change in price is a decrease, the new price must remain in effect for a specified period: 180 days for malt beverages and 30 days for wine. According to the commission, the postings are required for the administration of the privilege tax. Requiring

advance disclosure limits price competition. The attorney general in his report to the Governor on the OLCC stated that the commission "has no statutory authority to inhibit price reductions, and no public health or safety justification for doing so." [Footnote omitted.] Legislative Research recommends that the commission repeal this rule, and establish a confidential reporting system to obtain the privilege tax information it requires.

* * *

Volume discounts. OAR 845-10-210(1)(a) and (2)(a) prohibit discounts by beer and wine wholesalers for volume purchases. There appears to be no statutory authority for this provision. Such discounts should serve to strengthen competition among wholesalers. Legislative Research recommends that the commission repeal this rule.